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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 14,736

THEODORE R. CUMMINGS, CURT F. BECK, OWEN L. CLARK, GERALD F. HEFFERNAN, JOHN P. DUFFEY, HAROLD C. NUCCIO, RUSSELL E. VINING, ANNE DILLON DALTON and OMAR ALLVORD on behalf of themselves and all others similarly situated,

Plaintiffs,

and

NANCY ARONIE, ROBERT D. ALEXANDER, LINDA B. BEIZER, SANTE ESPOSITO, JR., and CHARLOTTE KITOWSKI on behalf of themselves and all others similarly situated, *Intervenors,*

v.

THOMAS H. MESKILL, Governor of the State of Connecticut; GLORIA SCHAFFER, Secretary of the State of Connecticut; ROBERT I. BERDON, Treasurer of the State of Connecticut; and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Defendants,

and

J. BRIAN GAFFNEY, *Intervenor.*

Before: SMITH, *Circuit Judge,* and BLUMENFELD and ZAMPANO, *District Judge.*

Relevant Docket Entries in District Court

Plaintiffs' Complaint against the Connecticut Governor, Secretary of State, Treasurer, and Comptroller, filed November 10, 1972.

Motion of J. Brian Gaffney to Intervene as Defendant, together with Statement and Memorandum, and Answer, filed December 10, 1972.

Hearing on Motion of Gaffney to Intervene as Defendant held on January 10, 1972; motion granted that day in Gaffney's capacity as elector and resident.

Depositions of Judge George A. Saden and James F. Collins, filed February 24, 1972.

Motion for Preliminary Hearing and Abstention, filed by Intervenor-Defendant Gaffney, February 29, 1972.

Hearing on the Merits and Motion for Stay (Abstention) held March 8, 1972; evidence taken from Plaintiffs' and Intervenor-Defendant's witnesses, and exhibits filed.

Memorandum of Decision of District Court, entered March 30, 1972.

Judgment of District Court, entered April 6, 1972, invalidating Apportionment Board Plan and appointing Special Master to prepare reapportionment plan.

Notice of Appeal to the Supreme Court of the United States, filed by Intervenor-Defendant Gaffney, April 13, 1972.

Motion for Stay of Judgment and Immediate Hearing, filed by Defendant-Intervenor Gaffney, May 24, 1972; hearing held same day.

District Court Memorandum denying motion for stay, filed May 26, 1972.

Motion by Defendant-Intervenor Gaffney filed June 15, 1972 for order that the Secretary of the State proceed to implement the Stay Order of the Supreme Court of the United States, issued on June 12, 1972 and reported at 407 U.S. 902, by conducting an election under the State Plan which was the subject of the Stay Order.

Hearing on above Motion held June 19, 1972, and Motion denied.

District Court Memorandum of Decision filed September 8, 1972 denying motion of Intervenor-Plaintiff Aronie et al. for order placing 1965 plan in effect, the court noting that the Connecticut Court had ordered the State Apportionment Board plan into effect for 1972 elections.

Plaintiffs' Complaint

[Caption omitted]

1. This action arises under the Fourteenth Amendment to the Constitution of the United States, the supremacy clause of Article VI of the Constitution of the United States, and the Civil Rights Act, U.S. Code, Title 42, Section 1983 and Section 1988. Original jurisdiction is conferred upon this Court by U.S. Code Title 42, Sections 1983 and 1988, and by Title 28, Sections 1343 (3) and 1343 (4). Relief herein is also sought pursuant to the Federal Declaratory Judgment Act, U.S. Code, Title 28, Sections 2201 and 2202, as well as under U.S. Code, Title 28, Sections 2281, et seq.

2. The within action seeks an interlocutory and permanent injunction to restrain the enforcement, operation, and execution of certain laws of the State of Connecticut by restraining officers thereof, namely the Governor, the Secretary of the State, the Treasurer, and the Comptroller from holding primary and general elections for members of the House of Representatives and of the Senate of the General Assembly of the State of Connecticut in accordance with a "Plan of Districting for the General Assembly of the State of Connecticut" (hereinafter referred to as the "Plan") dated September 30, 1971 and submitted by two members of a board acting pursuant to Article Third, Sections 6 d and 6 e of the Connecticut Constitution, on the grounds that said Plan violates the United States Constitution. Consequently, this action should be determined by a special court composed of three judges as provided in 28 U.S. Code 2281 et seq. Furthermore, this action seeks relief under Section 28 U.S. Code 2201 et seq. providing for the declaration of rights and other relations of any interested party or parties seeking such declaration, and for further necessary and proper relief based upon such declaratory judgment.

3. The plaintiffs are citizens of the United States, residents of towns or cities in the State of Connecticut as more specifically stated herein, taxpayers, and duly registered and qualified voters, and as such are entitled to vote for members of the Connecticut State General Assembly in the districts in which they reside. This action is brought by the plaintiffs and all other citizens, taxpayers, and voters of the State of Connecticut similarly situated as a class action, said other persons being so numerous as to make it impracticable to bring them before the Court; there are questions of law or fact presented herein common to such

persons; the claims of the plaintiffs herein are typical of the claims of said persons and the plaintiffs will fairly and adequately protect the interests of them in this action.

4. Thomas H. Meskill is Governor of the State of Connecticut; Gloria Schaffer is Secretary of the State of Connecticut; Robert I. Berdon is Treasurer of the State of Connecticut; and Nathan G. Agostinelli is Comptroller of the State of Connecticut. The defendants are sued in their respective capacities as Governor, Secretary of the State, Treasurer, and Comptroller of the State of Connecticut, being charged under the laws of the State of Connecticut with various duties and responsibilities pertaining to the holding of primary and general elections for members of the Connecticut General Assembly and to the certification of the results thereof. In addition, the defendant Gloria Schaffer, as Secretary of the State, is by statute Commissioner of Elections, and this action is brought against her as a representative of all officials, State and municipal, of the State of Connecticut charged with duties and responsibilities pertaining to the holding of primary and general elections for members of the General Assembly of the State; such persons being so numerous as to make it impracticable to bring them all before the Court. A question of law in this case affects all such defendants.

5. The Plan, subject to review by this Court, was approved and adopted by two members of the Board, Judge John R. Thim and Judge George A. Saden, and submitted on September 30, 1971 to the Secretary of the State. The third member of the Board, Judge Leo Parskey, did not approve of the Plan and submitted a minority report. The Plan reapportions the

General Assembly of the State of Connecticut by creating a House of Representatives consisting of 151 single member districts and a Senate consisting of 36 single member districts. The Plan consists of 197 pages and 136 maps and the senatorial and house districts are expressed in terms of names of towns or cities and, where portions of towns or cities are alluded to, in terms of 1970 census data.

6. The Connecticut State Constitution, in Article Third, provides as follows:

> "Sec. 3. The senate shall consist of not less than thirty and not more than fifty members, each of whom shall be an elector residing in the senatorial district from which he is elected. Each senatorial district shall be contiguous as to territory and shall elect no more than one senator.
>
> Sec. 4. The house of representatives shall consist of not less than one hundred twenty-five and not more than two hundred twenty-five members, each of whom shall be an elector residing in the assembly district from which he is elected. Each assembly district shall be contiguous as to territory and shall elect no more than one representative. For the purpose of forming assembly districts no town shall be divided except for the purpose of forming assembly districts wholly within the town.
>
> Sec. 5. The establishment of districts in the general assembly shall be consistent with federal constitutional standards."

7. The State of Connecticut has a population, according to the 1970 census, of 3,032,217. With 151

house (referred to in the Plan and sometimes herein referred to as "assembly") districts, the average number of people in each assembly district is 20,081. With 36 senatorial districts, the average number of people in each senatorial district is 84,228.

8. The assembly districts created by the Plan deviate from the average of 20,081 by a plus 3.93% and a minus 3.90% or a total deviation of 7.83%. 39 assembly districts, or 25.83% of the 151 assembly districts, deviate from the average by plus/minus 3.0 to 3.93%. 47 towns are segmented under the Plan so that a portion of a town is added to another town or a portion of another town to form an assembly district. In addition, 29 towns are divided between two or more assembly districts (not including those instances in which a segment of a town forms an assembly district wholly within a town). The result is that 78 portions of towns are used to form assembly districts not wholly within a town.

9. The senatorial districts created by the Plan deviate from the average of 84,228 people by plus 0.88% and minus 0.93%. Twenty-three towns are segmented to create the senatorial districts. The boundary lines of assembly districts do not mesh with boundary lines of senatorial districts. The result is that 81 assembly districts under the Plan are not located entirely within one senatorial district. In 48 of these 81 districts, a division between two senatorial districts occurs within a town.

10. The Board erroneously interpreted the supremacy clause of Article VI of the United States Constitution to mean that it could totally disregard the provisions of Article Third, Section 4, of the State Constitution, which prohibits the division of towns in the

forming of assembly districts except for the purpose of forming assembly districts wholly within a town. The Board's Plan, as is evident from examination of its results, is based on an interpretation of the supremacy clause of Article VI of the United States Constitution that since the federal districting standards of the Fourteenth Amendment to the United States Constitution requires segmenting of some towns, the state constitutional prohibition against segmenting of towns is rendered totally null and void by force of federal law. This interpretation of the supremacy of federal law ignores the principle of the supremacy clause that the United States Constitution should be applied to override a conflicting state constitutional provision only to the extent necessary to comply with federal constitutional standards and that when practicable, an accommodation must be achieved between the requirements of both the federal and state constitutions that will give full effect to federal requirements while giving the maximum possible effect to state requirements.

11. The Board erroneously applied the one man—one vote doctrine of the Fourteenth Amendment to the United States Constitution to achieve smaller deviations from population equality for the assembly districts than was required by the Fourteenth Amendment to the United States Constitution in view of Article Third, Section 4 of the State Constitution and thereby was compelled to segment an excessive number of towns in forming assembly districts.

12. As a result of the Board's erroneous interpretation of the United States Constitution stated in paragraphs 10 and 11 above, the Plan unnecessarily and excessively segments towns, fragments political communities, destroys voting patterns, isolates small

groups of voters, and creates political and administrative confusion which deny to the plaintiffs without due process of law the right to participate in the elective and political process as effectively as those who reside in districts wholly within town lines.

a. Plaintiff Russell E. Vining resides in the Town of Hamden and Plaintiff Omar Allvord resides in the Town of Groton. These towns of Hamden and Groton are unnecessarily or excessively segmented in the formation of assembly districts. Said plaintiffs, and persons similarly situated in other towns, are adversely affected and their constitutional rights violated by the Plan.

13. The General Assembly can be reapportioned (and plans will be submitted by the plaintiffs to the Court) to demonstrate that:

a. By keeping the same number of districts and the same percentage deviation as in the Plan, less towns can be segmented and these towns can be segmented fewer times.

b. By keeping the same number of districts as in the Plan and using a percentage deviation higher than the Plan, but within federal constitutional standards, substantially less towns can be segmented and these towns can be segmented substantially fewer times.

c. By changing the number of districts but within the state constitutional limits, and by keeping the same percentage deviation as in the Plan, substantially less towns can be segmented and these can be segmented substantially fewer times.

d. By changing the number of districts within state constitutional limits and using a percentage devi-

ation higher than the Plan, but within federal constitutional standards, substantially less towns can be segmented and these towns can be segmented substantially fewer times.

14. The plaintiffs have constitutionally protected rights under the Fourteenth Amendment and the supremacy clause of Article VI of the United States Constitution, in the alternative, either:

a. to have a plan which gives maximum effectiveness to the state constitutional prohibition against segmenting towns in forming house districts consistent with a resulting percentage deviation from equality no higher than federal constitutional standards will permit; or

b. to have a plan which keeps the deviation of the districts from equality to the smallest amount practicable while giving no significance to the State constitutional prohibition against segmenting towns in forming house districts.

The plaintiffs are denied rights under subparagraph a. herein in that the plan (i) segments more towns and more often than need to be segmented by a plan with the same deviation from equality and the same number of districts as the Plan; (ii) segments substantially more towns and substantially more often than need be segmented by a plan with the same number of districts as the Plan and a higher deviation but within federal constitutional standards; and (iii) segments substantially more towns and substantially more often than need to be segmented by a plan with a different number of districts (but within state constitutional limits) and the same deviation from equality as the Plan; and (iv) segments substantially more

towns and substantially more often than need to be segmented by a plan with a different number of districts (but within state constitutional limits) and a higher deviation but within federal constitutional standards.

The plaintiffs are denied rights under subparagraph b. herein in that the Plan creates 39 assembly districts, or 25.83% of the 151 districts, with a deviation between plus/minus 3% to 4% which deviation is without justification on any rational state policy and thereby causes the Plan to be in violation of the requirement of equality under the Fourteenth Amendment of the United States Constitution.

15. The deviations from equality of the senatorial and assembly districts result from an intent to achieve and do achieve partisan advantage for the Republican Party amounting to political gerrymandering and said deviations are without justification and cause the Plan to be in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

16. The Plan contains a built-in bias in favor of the Republican Party, denies or dilutes voting power because of partisan political group characteristics, and reveals a pattern of discrimination based on partisan political consideration amounting to political gerrymandering, and deprives members of other political parties of fair and proportionate representation, all in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

a. Plaintiff Anne Dillon Dalton resides in West Hartford in Assembly District 19; Plaintiff Owen L. Clark resides in West Hartford in Assembly District 20; and Plaintiff Omar Allvord resides in Groton in

Senate District 18 of the Plan. These assembly and senatorial districts, among others, are the result of political gerrymandering. These plaintiffs and other persons similarly situated in other General Assembly districts are adversely affected and their Fourteenth Amendment constitutional rights violated by the Plan.

17. The tortuous lines which delineate many of the senatorial and assembly districts and the crazy-quilt shapes of these senatorial and assembly districts create a lack of compactness, reveal a lack of rationality in the composition of the districts, demonstrate a lack of good faith in the creation of the Plan, all of which result in the Plan:

a. Failing to achieve practicable equality of the districts required by the equal protections clause of the Fourteenth Amendment of the United States Constitution. The following senatorial and assembly districts are among the most glaring examples of these defects:

Senatorial Districts 4, 10, 17, 28, 29, 32, and 34.

Assembly Districts 5, 12, 13, 15, 19, 20, 41, 88, 125, 127, 131, 138, and 140.

b. Forming districts on the basis of criteria not rationally related to the purpose of redistricting in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

The General Assembly can be reapportioned (and plans will be submitted by the plaintiffs to the Court) to form districts of substantially greater compactness than the Plan.

(i) Plaintiff Theodore R. Cummings resides in Manchester in Assembly District 12; Plaintiff Owen L. Clark resides in West Hartford in Assembly Dis-

trict 20; and Plaintiff Curt F. Beck resides in Mansfield in Senatorial District 29. These plaintiffs and other persons similarly situated in other General Assembly districts are adversely affected and their constitutional rights violated by the Plan.

18. Two assembly districts under the Plan (Assembly Districts 104 and 79) are non-contiguous and several assembly districts and at least one senatorial district are practically non-contiguous (Assembly Districts 5, 15, and 131; Senatorial District 9) revealing a lack of rationality in the composition of the districts and demonstrating a lack of good faith in the creation of the Plan, all of which results in the Plan failing to achieve the practicable equality required by the equal protection clause of the Fourteenth Amendment to the United States Constitution.

a. Plaintiff Gerald F. Heffernan resides in the Town of Ansonia in Assembly District 104. This plaintiff and other persons similarly situated in other General Assembly districts are adversely affected and their constitutional rights violated by the Plan.

19. The voters residing in the following areas in the State of Connecticut are not included in any Assembly District under the Plan and are thus disenfranchised from voting for members of the House of Representatives, arbitrarily discriminated against, and denied voting rights without due process of law and denied the equal protection of the law in violation of the Fourteenth Amendment. The voters so affected and denied the aforesaid right reside:

a. In the Town of Bristol in block groups 2, 3, and 4 of census tract 4052; in block groups 2, 3, and 4 of census tract 4054; and in block groups 2, 3, 4, and 5 of census tract 4055.

b. In the Town of Enfield block group 2 in census tract 4807.

c. In the Town of Fairfield block group 9 in census tract 604.

(i) Plaintiff John P. Duffey resides at 96 South Street in Bristol in block group 4 of census tract 4055; and Plaintiff Harold C. Nuccio resides at 38 Green Valley Drive in Enfield in block group 2 in census tract 4807. These plaintiffs and other persons similarly situated in other Assembly Districts are adversely affected and their constitutional rights violated by the Plan.

20. The Plan is expressed in terms of census data. The Plan's descriptions of approximately 20 of these assembly districts are vague and ambiguous and cannot be translated into geographical lines to create the actual boundaries of these districts with requisite accuracy thus denying to residents of those districts certainty as to which assembly districts they are located, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

21. The Board has submitted a single Plan for the "Alteration of Districts of the General Assembly." If the reapportionment of one house of the General Assembly is held invalid, the Plan for the other house must also fail.

22. The plaintiffs have no adequate remedy at law for relief herein sought.

23. By reason of the foregoing, the plaintiffs respectfully pray for judgment as follows:

a. That a special three-judge court be called to hear and determine this cause, as by law provided in U.S. Code Title 28, Section 2881 et seq.

b. Declare and determine that the Plan of Districting for the General Assembly of the State of Connecticut dated September 30, 1971 is void and invalid as being contrary to the Constitution of the United States.

c. Restrain the defendants and their privies by interlocutory and permanent injunction from doing any act or taking any step in furtherance of holding primary or general elections for members of the General Assembly in accordance with said Plan.

d. The Court itself, or through a Special Master, approve a plan of districting for the General Assembly of the State of Connecticut in accordance with constitutional standards.

e. Pending compliance with any direction made by this Court, jurisdiction over all the parties herein be retained by this Court.

f. The plaintiffs have such other and further relief as to this Court may be just and equitable.

/s/ ROBERT SATTER
Robert Satter,
Attorney for the Plaintiffs
60 Washington Street
Hartford, Connecticut

/s/ JAMES A. WADE
James Wade,
Attorney for the Plaintiffs
799 Main Street
Hartford, Connecticut

November 18, 1971

Answer of Intervenor-Defendant J. Brian Gaffney

[Caption omitted]

FIRST DEFENSE

As more fully shown by the Complaint, this action seeks to restrain implementation of a constitutional procedure of the State of Connecticut, which procedure has not been authoritatively interpreted by the courts of the State. Appropriate and effective remedies exist in said State whereby an authoritative interpretation of this procedure and its application to these plaintiffs may be obtained in the courts of the State, including but not limited to a certain action for declaratory judgment instituted in the Superior Court, Hartford County, November 12, 1971, entitled John H. Miller vs. Gloria Schaffer, as Secretary of the State, docketed in said court as Number 173606, and therein pending. By reason of the pendency of said action in said state court, it is improper and contrary to the comity of the courts and the precedents of federal practice that this Court should assume jurisdiction and concurrently try the same subject matter. Wherefore, this defendant requests this Court to dismiss this action, or to stay action herein, until that action in the Superior Court of the State of Connecticut or another appropriate action has been prosecuted to final judgment or otherwise disposed of, and then to ascertain whether or not any issues presented in this action are available for consideration by this Court.

SECOND DEFENSE

This defendant admits the allegations contained in Paragraphs 4, 5, 6, and 7 of the Complaint, excepting the allegation of Paragraph 4 that a question of law

in this case affects all defendants, which is denied; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1, 2, 3, 8, and 9 of the Complaint, excepting the allegation of Paragraph 2 that the Plan violates the United States Constitution, which is denied, and denies further each and every other allegation contained in the Complaint.

THIRD DEFENSE

The Board intended each Assembly District of the Plan to be contiguous as to territory, and an apparent noncontiguity of Assembly District 104 is unintentional, inadvertent, and insubstantial, in that a very small and unpopulated spur of land in Enumeration District 67, as shown on a map compiled for the 1970 census of Connecticut taken by the United States Department of Commerce, Bureau of the Census, and issued by the Bureau of the Census, being the basis of this Plan in this particular and being more specifically identified as that certain map number 20 of Southwestern Connecticut of the Metropolitan Map Series bearing the designation "United States Department of Commerce," Bureau of the Census, Geography Division, produces discontinuity among Census Enumeration Districts 73, 75, and 76 comprised within said District 104.

FOURTH DEFENSE

By clerical error in transposition of statistical population data of the aforesaid census to geographical description of said census, in Districts 59, 79 and 134 of the House of Representatives in said Plan, there appear instances of partial misdescription of portions of

said Districts, attributable in part to the available census data, and having no effect on the population in fact comprised within said Districts, in that, in the description of District 59 there is a reference to "B G number 1 of census tract 4807" rather than to "census tract 4807"; in the description of District 79 there is a reference to "B G number 1 of census tract 4052, B G number 1 of census tract 4054, and B G number 1 of census tract 4055" rather than to "census tract 4052, census tract 4054 and census tract 4055" and in the description of District 134 there is reference to "B G numbers 1, 2, 3 and 4 of census tract numbers 604" rather than to "census tract number 604".

Wherefore, this defendant respectfully prays that the Complaint be dismissed, or, in the alternative:

1. A declaratory judgment construing District 104 aforesaid in accordance with its intended contiguity, reforming said District by incorporating that portion of ED 67 lying southerly of Beaver Brook, as said Brook is shown on said Map number 20 referred to in the Third Defense herein, into said District 104 and by deleting the erroneously surplus descriptive references for Districts 59, 79 and 134 as recited in the Fourth Defense of the Answer of this defendant to the Complaint, and declaring said Plan as so construed to be valid and effective for the general election to be held November, 1972; or an order returning the Plan to the Board for this or other action appropriate to these ends, and for the further consideration of and promulgation by this Court in the effectuation of this Plan.

2. An order requiring the defendant the Secretary of the State to publish said Plan forthwith, as required by said constitutional mandate, with the full force of

law as corrected hereby, and requiring the named defendants and other public officials and bodies charged with the conduct of elections to conduct elections and primaries for the General Assembly thereafter in accordance with said Plan, any conflicting provision of the general statutes of the State to the contrary notwithstanding.

3. An order returning the Plan to the Board, to provide an alternative description of electoral districts in said Plan, by reference to streets and highways and other fixed and commonly recognized natural and political entities and boundaries, for the further consideration and promulgation by this Court in the effectuation of this Plan.

4. Such other and further relief as the Court may deem just and equitable in the premises.

/s/ FRANCIS J. MCCARTHY
Francis J. McCarthy
Attorney for J. Brian Gaffney, Applicant for Intervention
700 Main Street
Hartford, Connecticut 06103

Deposition of Judge George A. Saden, February 14, 1972

[Caption omitted]

[4]

George A. Saden,

The Deponent, having been duly sworn by the Notary Public, testified as follows:

Direct Examination

By Mr. Satter:

Q. Mr. Saden, were you one of the board members that approved of the plan of districting of the General Assembly of the State of Connecticut dated September 30, 1971. A. Yes.

Q. Am I correct in referring to you and to the three people who made this plan as members of the board? A. I guess that's the way the constitution sets it out.

Q. That's the way the constitution sets it out? A. It talks of two Judges of the Superior Court and then an elector selected by them.

Q. And they are referred to as a board? A. They are referred to as a board, yes.

Q. By whom were you selected? A. By the minority leader in the House.

Q. And he is a Republican? A. Yes.

Q. And prior to your becoming a Judge on the Superior Court you were General Counsel to the Republican Party? A. Yes.

Q. And how long have you been General Counsel to the Republican Party? A. I don't know. A couple of years. Two or three years, I'd say. I couldn't give you the exact

time [5] on that. Starting back in the '69 session. Actually I suppose it would be just before January of '69, late '68, somewhere in there.

Q. And during the '71 session of the General Assembly had you worked on reapportionment on behalf of the republican party? A. I had, to a slight extent. I was in on some conferences, as you know, with yourself and John Newman, Mr. Collins, I think it was a Mr. Caplan, and I attended a few of the meetings at the beginning of the committee itself but I didn't do any substantial amount of work on it.

Q. And when were you appointed Judge of the Superior Court? A. Well, I took office on June 14, 1971. The confirmation in the legislature went through, I think, a week or two before that. I'm not certain.

Q. Up until the time you were confirmed— A. I wasn't sworn in till June 14th.

Q. Up until the time that you were confirmed by the General Assembly you were counsel to the republican party in the General Assembly, is that correct? A. Yes.

Q. Now the other members of the board were Judge Leo Parskey and— A. Mr. Parskey.

Q. Yes. A. Since you want to make it Mister all the way along [6] the line we'll use that for both of us and I suppose Mr. Thim.

Q. What is his first name? A. John.

Q. Mr. John Thim. Now John Thim had been the former Speaker of the House of Representatives, is that correct? A. I think he was about twenty-five years ago, somewhere in the late '40's if I'm not mistaken, but I don't have the exact date. But he was—that was about the period of time he was active. I don't know how long prior to then but somewhere in that range.

Q. And how was Thim appointed as the third member of the board? A. I received a letter from Mr. Parskey with a list of six names of six judges and Mr. Thim's name was on the list. Mr. Parskey indicated in his letter that any one

of the six were satisfactory to him so I selected Mr. Thim on that basis and we agreed on Thim.

Q. And when were you appointed a member of the board? A. I don't remember exactly. Sometime the first week in July, first or second week in July I received a letter from Mr. Collins. That was about the time.

Q. That's Mr. Francis Collins who is the Minority Leader of the House of Representatives? A. Yes.

Q. When was the first time after your appointment that the board met to deliberate on the matter of [7] redistricting of the General Assembly A. It was some time in the latter part of August, as I recall it, but I don't know exactly what day. Mr. Parskey had been away on a vacation from the end of July until some time late in August, and when he returned we had a meeting, a first meeting, some time the latter part of August.

Q. When was Mr. Thim selected? When was Justice John Thim selected? A. I don't know the exact date. I would say some time in—I received a letter from Mr. Parskey some time late in July and I replied to it some time the early part of August indicating that I was satisfied to have Justice Thim serve as the third man. Now of course I think that when we did get together later on, when Mr. Parskey got back from his vacation, I think we both signed some kind of a statement indicating our approval of Justice Thim as the third man. That would have been late in August although my letter to Parskey would have been early in August.

Q. And so you think that Justice Thim was appointed as the third man some time in the latter part of August? A. Well, it depends on what you call an appointment. The letter in which I selected his name or the formality of Parskey and I signing some kind of a paper. But it was some time in August in either event.

Q. And when did the board first meet to deliberate on this? [8] A. I told you, some time the latter part of August is the best I can recall.

Q. And were all members of the board present at that time? A. Yes.

Q. And where did you meet? A. We met—all our meetings were at Justice Thim's office here in Hartford. We did have one luncheon meeting as I recall it in New Haven, the three of us, I can't remember exactly when that was, but I believe that preceded our first meeting in Hartford.

Q. And how many meetings did you have altogether as a board? A. I don't know. I don't keep track of them. I couldn't give you the number of meetings we had.

Q. Did you have a working arrangement as to how you were to proceed with the redistricting of the General Assembly? A. I don't know what you mean by a working arrangement. The situation was one in which Parskey and I were going to come up with some suggestions and then meet with Justice Thim and discuss them. It was Justice Thim's idea that we ought to try, Parskey and I ought to try to reach some kind of an agreement between us, and we started off on that basis where Parskey took some time to put together whatever his ideas were and I was trying to do the same thing.

Q. And which House of the General Assembly did you start with to attempt to district? [9] A. Well, Parskey selected the Senate so we started with the Senate and spent most of our time on the Senate.

Q. Well, by most of your time— A. Practically all of it. Actually we never really got into a discussion of the House at all. Right up to the very last day. We were arguing about the Senate and although I had submitted a House plan to Parskey sometime I'd say early in September, we never did get to discuss it in any detail at all because we were so much more involved with the Senate and Parskey wanted to get the Senate done first. He didn't want to go on to the House until he had the Senate completed.

Q. So you are saying that you really had no, virtually no discussions over the House? A. Yes, that's correct.

The only thing is Parskey never came up with a House plan except for, as I recall it, a so-called block plan where areas of the State were blocked off and assigned a certain number of assembly seats but the individual assembly seat was not delineated on this small scale map that we were using, you know, the type we have, it was about, oh, a foot and a half by a foot, something like that.

Q. Larger than a map of this kind? A. Well, I think the one, his block plan that he gave me I think was the size of that form that you have there.

Q. What is that, eight by ten, isn't it? [10] A. I suppose.

Q. Now let me just be clear. Are you saying then that the board, that you and Parskey essentially never deliberated over the House plan at all? A. I think that's about the size of it. The only thing that Parskey ever mentioned to me about the House plan was something to the effect the day before we finally voted on the Senate plan, or a day before, I can't recall exactly, in which he indicated to me that our House plan seemed to be all right except for maybe one or two changes here and there, but he wasn't going to do anything with the House plan until the Senate plan was straightened out.

Q. Do you have a copy of the House plan which you submitted to Mr. Parskey in September? A. I don't know whether I have one now or not. I thought I had copies of them but in trying to look for my papers in the process of moving from my practice office into my courthouse office a lot of things have gotten mixed up and lost but I can try to find one. If I have one I will be very glad to bring it in or give it to Mr. McCarthy.

Q. Give it to Mr. McCarthy and if we can stipulate it as the plan we might—would you agree to having it submitted as an exhibit?

[11] Mr. McCarthy: Yes.

Mr. Satter: If Mr. Saden tells us this is the one he submitted to Mr. Parskey.

Mr. Hultgren: May I ask for what purpose since it was never approved?

Mr. Satter: I am just trying to show the development of the plan, the background material.

Mr. Hultgren: All right.

By Mr. Satter:

Q. Was there any significant difference between the House plan that you submitted to Mr. Parskey in September as your plan and the one which is essentially adopted—which was adopted, leave out the word essentially, as the board plan with respect to the House? A. I think the plan that was ultimately adopted is substantially the same. There might have been very few changes but I don't recall them specifically offhand what they might be but it was essentially the same plan.

Q. Were the changes which were made in the House plan as ultimately adopted discussed with Mr. Parskey? That is the changes in the plan you submitted to him in September. A. I recall one change that was made which was made at his request. The only comment that sticks in my mind about the House plan coming from Mr. Parskey was [12] the fact that he would like to see Ruby Cohen retained in his district and I think I did make a change in that district which didn't affect the over-all plan at all but might be more desirable from Ruby Cohen's point of view.

Q. And Ruby Cohen is a representative? A. He is a democratic representative over in the Colchester area, I think.

Q. Other than that do you remember any other discussions you had with Mr. Parskey respecting the House plan as you submitted it to him in September and as it was ultimately adopted in September 30, 1971? A. I don't recall any other suggestions, any other discussions. You see, what happened was that when we took a vote on the Senate plan which was, as I recall it, on a Friday about noontime,

the 30th of September being the last date for filing, the previous Friday around noontime—

Q. How many times before that date would that have been? A. I don't know but it would be the Friday before the Thursday. Approximately six days, wouldn't it?

Q. Mm-hm. Thursday. Was September 30th on a Thursday? A. Yes, I think it was. I'm almost certain it was [13] a Thursday.

Q. Let me just get a calendar. September 30th was on a Thursday. Would it be September 24th? A. Yes, the previous Friday would be the 24th of September. It was approximately around noontime on that day that we finally took a first vote on the Senate plan, and Judge Thim voted for my plan at that time and Mr. Parskey became very angry about it and stormed out of the office so we never got a chance to sit down and go over the House plan with him from that point on.

Q. And so you are saying that at that point the deliberations between the two of you in effect ceased? A. Between the two?

Q. Between you and Mr. Parskey? A. For all practical purposes. I did speak to him, I think, once or twice afterwards but nothing of any great consequence that I can recall on the telephone.

Q. And were any changes made in the House plan during that week from September 25th approximately to September 30th when you prepared the ultimate plan? A. I think there might have been one or two, there were one or two small changes that were made under my direction to try to get the deviations down as reasonably low as we could, and where we were able to improve them a little bit in one or two instances we tried.

[14] Q. And did you discuss those with Mr. Parskey? A. No, I didn't discuss those particular changes with him.

Q. Was there then a subsequent meeting after the 25th to consider the plan as you finally adopted it? A. No, there wasn't.

Q. Was there then a vote taken by the committee, by the board, to adopt this plan? A. A vote was—Justice Thim and I voted to adopt the Senate plan and the House plan.

Q. Was there a meeting held to formally adopt the plan? A. Well, none of our meetings were formal. We had no minutes, we had no secretary, and we had no transcription of anything. It's probably just as well. Some of the language that occurred wouldn't lend itself very well to transcription.

Q. So it is fair to say there was never a formal meeting or even a meeting at all on September 30th to adopt this plan? A. Oh, no, no, that's not true. This plan when it was actually signed was signed—I signed it and we took it down to Hamden where Justice Thim lives and he signed it on the 30th at that point and we discussed a few things with him.

[15] Q. Who is we? A. I did.

Q. Not Parskey? A. Oh, no, no, Parskey wasn't there. And then I brought the plan back and I filed it about four o'clock in the afternoon, as I recall.

Q. Did you show it to Mr. Parskey? A. I gave him a copy of it, the plan. I'm not sure—yes, I gave him, I'm pretty sure I gave him a copy of the plan because I went over to his office that day and he asked me to deliver his so-called dissent with the plan which I agreed to do and I did.

Q. Did you give him a copy of the plan? A. I think I did. I can't recall now whether I—I have the impression that I did on that day but maybe I didn't, I'm not sure. We were short on copies at that point because we hadn't yet been able to get them photostated in any quantity at all.

Q. Would you have given him a copy? You say you are not sure whether you gave him a copy of the plan? A. I thought I did but I'm really not certain. I don't have any specific recollection of it.

Q. Would the plan have at that point included both the description of it as stated in the bound volume which con-

tains a submission to Honorable Gloria Schaffer dated [16] September 30, 1971 and all of the maps that were to be appended to it? A. It wouldn't have included the maps because we only have one set of maps and that's all there were available to us which made it very difficult to work with in the first place because we were afraid to mark any of those maps and we needed those maps to file with the Secretary of the State so I couldn't have given anybody—no one got a set of the maps except the Secretary of the State with the plan itself.

Q. So would you have—you don't recollect whether you gave Mr. Parskey a plan but if you had given him a plan you would not have given him any maps? A. That's correct, yes. He would have gotten only the typed plan with a reference to the maps but not the maps themselves.

Q. Would you have given him any—and you don't recollect whether or not—excuse me, withdraw the question. Let me start over. You don't recollect whether or not you gave him any maps which would have delineated on it the districts in both the House and the Senate? A. Are you referring to the small maps?

Q. Yes. At the time you gave him or at the time on September 30th when you went to see him. [17] A. No, I don't think we had a map, one of those forms. We did try to put together a rough map on these small map forms of the House and the Senate. That was done very late in the afternoon and I'm not sure but I don't think I had one available to me at the time I saw Parskey earlier that afternoon so I don't think I gave him that roughly drawn map.

Q. And whether or not you recollect informing him of any changes which you made in either the House or the Senate plans between your last conversation with him and the time that you and Mr. Thim signed the plan? A. Well, what do you mean, the last conversation with him on Friday, the 24th?

Q. Yes. A. And the time that Justice Thim and I signed the plan on the 30th? A. Yes.

Q. Yes. A. The only thing that I can recall is I know I talked to him a couple of times and I do remember specifically the Ruby Cohen situation because he had asked me whether the House plan was going to be substantially the same as the one I had given him originally and I had indicated that it was but I had made one or two changes on it one of which was the Ruby Cohen change because he had indicated his personal desire to have that type of [18] change made.

Q. Well, did you inform him of specifically other changes other than the Ruby Cohen change? A. I don't recall that I gave him any specific breakdown on the other individual changes or not.

Q. Would it be fair to say that you probably did not? A. Probably. I can't answer that with any great degree of accuracy offhand.

Q. But you probably did not inform him of the specific changes? A. Probably I did not go over all the individual changes, last minute changes that were made prior to the plan being signed. There was not that large a number and to try to discuss them without going over the actual maps with someone doesn't—is not very helpful, wasn't very helpful then, wouldn't have been.

Q. Now when did you— A. I might add I gathered the fact that he walked out, stormed out of Justice Thim's office, indicated pretty clearly to me at least that he just wasn't interested in any further consultations about this matter. He was very angry and wasn't going to be bothered talking about the House or anything else.

Q. Now when did you start working on this matter [19] of districting after you became a board member? A. I personally started working in July. I was here in Hartford almost every day—well, not every day but about four days a week, I'd say, through July and August, and in September I was here just about every day, almost every day.

Q. And where did you work? A. I did most of my work in the Capitol, in the House Minority Office where the records and papers were available and down in the—some of it down in the so-called Reapportionment Committee Room on the first floor.

Q. And did you consult with people while you were working on your version of the plans? A. Yes.

Q. With whom did you consult? A. Mr. Collins.

Q. Mr. James Collins? A. James Collins.

Q. Mr. Orcutt? A. Yes. Mr. Collins primarily.

Q. Who were each of them? A. Well, they were two part time volunteers. Mr. Collins did as an attorney here in town and I don't know whether he held any official position in the last session of the legislature or not, I don't recall, but he offered [20] to assist and I was very glad to have his assistance for some of the mechanical parts of the operation, the mathematical parts of the operation I found very helpful.

Q. He works with the republican party? A. Well, I don't know whether he is working with the republican party or not. He was working with me.

Q. Well, hadn't he worked with the republican party during all of the legislative sessions in dealing with reapportionment? A. I don't recall whether he was in on working with the committee or not or whether he was assigned to the committee. He might have been but I don't recall offhand.

Q. But it would have been with the republican party, would it not? A. Oh, yes, it would have been with the republican party, no question about it, just as the democrats had their representatives including yourself.

Q. And Mr. Orcutt, who was he? A. He is a representative, a republican representative. I think he is from the Town of Guilford or Madison, I'm not sure which town it is.

Q. And he was the republican cochairman of the Reapportionment Committee of the 1971 session of the legisla-

ture? A. Well, I don't know of my own knowledge what his [21] official position was with that committee but if you say he was the cochairman, republican cochairman, you would probably know better than I.

Q. Mr. Saden, you are not implying that I know more about the republican party than you do, are you? A. I wouldn't be surprised if you do.

Q. Now what role did Mr. Collins play in the development of these plans? A. Well, I laid down the basic rules that I was interested in seeing followed and then he picked up the mathematical end of it and the piecing together of the jigsaw puzzle, made some suggestions and recommendations which we discussed from time to time.

Q. Did he actually prepare the plan for the House, let's say? Would he actually delineate the districts? A. Well, I wasn't always present when every individual map was being drawn so it's pretty hard for me to answer in those terms. I'm sure that he had a lot to do with the mechanics of both of the Houses.

Q. You say that his role was primarily that of a mechanic? A. I didn't say it was that primarily of a mechanic. I thought he was a pretty good mathematician too and seemed to have the figures pretty well in hand and was very helpful to me in discussing both the figures and the map [22] drawing itself.

Q. In the preparation of your plan for both the House and Senate did you consult with other members of the republican party? A. Very few individuals in the republican party. There were a few democrats and republicans who spoke to me from time to time about the plan.

Q. But were your consultations primarily with republicans? A. I wouldn't say primarily with republicans. I think I spoke to as many democrats as I did republicans.

Q. Did you consult with the republican party leadership? A. On a few occasions I did talk to Mr. Gaffney but not very many occasions, maybe two or three times in the course of the three months that I was working on it.

Q. Did you ever speak to the Governor? A. Never.

Q. Did you ever speak to any of the democratic party? A. Yes.

Q. Who? A. Oh, I recall speaking to Mr. Carazello on one occasion, just very briefly once with once Mr. Bailey in the hallway at the Capitol one day. Let's see, there were a couple of others. I don't recall offhand who they were.

[23] Q. But didn't you, Mr. Saden, feel that your responsibility, having been appointed by a minority leader of the House, that your primary responsibility in the development of this plan was to protect the interests of the republican party? A. No, that wasn't my primary responsibility. I think my primary responsibility was to try to develop what I considered a fair plan.

Q. Are you saying to me you had no partisan consideration in your consideration of these districts? A. I don't think I had any partisan consideration in it. I think that we finally came out with a plan which will reflect more accurately, I hope, as far as I can judge it, and there are no certainties in this business, at least I don't know of any certainties, and I didn't at the time the plan was drawn, but I would expect that it would more accurately reflect the votes on the Senate and the House lines in the General Assembly much better than what the reapportionment plan that was developed in '64 and '65 did but that's just part of the answer.

Q. What data did you use in dealing with—in creating these districts? A. The data?

Q. Yes. A. Well, of course the first thing that we had to do was to try to abide by the one man, one vote principle of the Reynolds-Sims case—

[24] Q. I'm not asking about principles. I'm asking you what kind of factual data did you use? Did you use the federal census material? A. Oh, yes.

Q. Did you also use party registration? A. No. I don't recall. I didn't specify the use of party registration at all. I did go to the actual votes in the '66, '68 and '70 elections.

Q. And is the election— A. As a test of the final plan, to test the plan against those votes.

Q. Did you use those election results to create districts? A. No, not the election results alone to create districts. What I was doing or trying to do was to conform to the one man, one vote principle in both Houses as far as reasonably possible. I was doing—I instructed Mr. Collins that we try as far as we reasonably could do so to maintain the town boundary lines in the House. We were not obliged to do this in the Senate. And I was also trying to work out a plan that would reflect, and I think this is a corollary of the one man, one vote theory, a plan that would reflect the over-all voting pattern in the General Assembly so that instead of having a Statewide plurality, for example, as you will see if you will look at the statistics for '66 and '68, a Statewide plurality on the democratic side of somewhere between fifty-two percent to fifty-four [25] percent in one of the elections and fifty-four in the other, I'm not sure which it was, producing a seventy percent representation on the democratic side in the '66 election in the Senate and a sixty-seven percent representation in the Senate in the '68 election, so that you would have a greater proximity between the actual numbers of control within those two groups corresponding with the over-all plurality of the winning party.

Q. In order to achieve that object did you not then have to look at election results and use those election results in creating these districts? A. To a certain extent there is no question we had to do that and I think this is part of the development of a fair plan because it's conceivable, you see—

Q. That's not what I asked you. I asked you whether or not you used the election results in creating these districts? A. To a certain extent we did shape some of the districts in order to achieve that result and I think the plan that we ultimately got is the plan that does create a fair basis for an election because if you test the plan against the '66

and '68 results you will find that the democrats would win in this plan in both of those elections.

Q. Did you give consideration in the creation of these districts to incumbency? A. No, not particularly at all. It would have been very simple, for example, if you wanted to draw a [26] partisan plan, if I wanted to draw a partisan plan that I could have eliminated all the democratic leadership in both houses.

Q. Didn't one of your plans actually attempt to eliminate some of the leaders of the House? A. No. There was one set of plans that I drew which I thought was unfair and which I so told Mr. Parskey and Justice Thim, that it would give the republicans a great advantage far out of proportion to what they would be entitled to in the event of an election where the democrats won the Senate line and would still lose control in the Senate, and I discarded that plan purposely because of that fact, but I made no effort to destroy any of the democratic leadership.

Q. Who actually drew out the districts which you submitted for the House? A. I guess Mr. Collins and Mr. Orcutt did the actual mechanics of putting together the figures and the drawing of the maps themselves and submitted them to me.

Q. So they did the real work of delineating the districts and you looked it over after they were completed, is that correct? A. Essentially that's probably a fair appraisal of it.

[27] Q. And part of your instruction was that in creating these districts they were to take into account the election results of prior elections?

Mr. Hultgren: I will object to that. That wasn't the evidence of what Judge Saden stated.

Mr. Satter: I am asking—

Mr. Hultgren: As I recall he said—

Mr. Satter: I'll ask the question again.

Mr. McCarthy: Let's object to form. Restate it. It was an argumentative question.

By Mr. Satter:

Q. The factor that you—did you tell Mr. Orcutt and Mr. Collins to consider in their creation of both the Senate and the House to consider the factor of the election results of prior elections? A. I wanted the plan to be tested against prior elections to try to see whether it was a fair plan and would react as it should react in '66 and '68 in favor of the democrats and react as it should in 1970 in favor of republicans, and I asked them to keep that in mind although that wasn't the primary consideration of drafting the plan. It was a factor in that sense.

Q. Now you have alluded to the one man, one vote concept in your testimony today. Did you have in mind [28] or did you instruct the creators of the districts in both the House and the Senate to have in mind a specific percentage deviation from average population? A. No, I didn't. I wanted it as reasonably low as we could without tearing up the whole state.

Q. Did you have any particular percentage deviation in mind or did you—withdraw that question. Did you instruct Mr. Collins and Mr. Orcutt to have any specific deviation in mind as they develop these specific districts? A. No, there was no specific hard and fast deviation figure in mind. I wanted to keep it low, that was all.

Q. Did you feel compelled by the equal protections clause in the United States Constitution to keep within a low percentage deviation? A. I don't think you have much choice but to keep the deviation low the way I understand the law.

Q. Did you feel that this requirement of keeping a low population deviation from the average was the dominant factor in establishing—the dominant legal factor in establishing the districts within the plan? A. It was a primary factor. We had to start with that first. That is to be the over-all guiding factor in the whole picture, but there were

other considerations [29] that had to be—that I thought deserved some thought also.

Q. In your development of this plan, and by you I assume I am referring to you and those who work under your guidance and your direction, did you have any specific percentage deviation within which you sought to keep within? A. No, I had no specfic number in mind.

Q. Did you have any range? A. Only that I wanted the range pretty low, as low as reasonably possible keeping in mind the other factors that I mentioned to you to develop what would be an overall fair plan.

Q. And those were the two factors that you had in mind, a low percentage deviation and an over-all fair plan. Were those the dominant factors in your mind? A. Plus the fact that keeping in the House, at least trying to as far as we could to maintain town integrity on lines, although I realized in the House we weren't going to be able to do it as well as we could do it in the Senate.

Q. As between keeping town lines, retaining the integrity of the town lines and keeping the low deviation, which did you feel was dominant? A. Low deviation.

Q. Did you feel compelled to that low deviation [30] by your interpretation of the cases interpreting equal protection clauses in the United States Constitution? A. I think so. I don't see how you could read these cases differently. I think the one man, one vote theory pretty much makes town lines rather unimportant, whether we like it or not. I don't especially like it that way but I don't suppose there is a great deal we are going to be able to do about it.

Q. And therefore is it fair to say then that in this creation of this plan that under your instructions town lines were to be—well, I withdraw the question. A. I wasn't going to answer. The answer would have been no anyway.

Q. Well, I didn't ask the question. Now did you— A. I didn't tell them to disregard town lines.

Q. Did you make any attempt when they submitted any plans to you, that is, when they meaning Mr. Collins and Mr. Orcutt—excuse me. Let me withdraw that question and start all over again. I want to be clear in my mind as to how you operated, Mr. Saden. Did you yourself mechanically draw these districts or did you have Mr. Orcutt and Mr. Collins do it for you? A. I didn't do a great number of them but there were times when I participated in it, in the drawing of districts, but the bulk of them I did not do, the actual [31] mechanics of drawing the maps themselves, I didn't do all of that. I looked at them afterwards.

Q. And they were done, the drawing of the maps, both for the House and the Senate, were done primarily by Mr. Orcutt and Mr. Collins? A. Mr. Collins I think assisted by Mr. Orcutt, yes.

Q. Was there any plans that they submitted to you which you sought to change by reducing the number of town lines which had been cut by their plans? A. You're talking about the House plan, I think?

Q. The House plan. A. I don't recall now whether-we made one or two changes but I don't recall any specific instances offhand.

Q. Was it your theory, Mr. Saden, that once you had to cut some town lines that it really didn't make any difference how many other town lines you cut? A. No, that wasn't my theory.

Q. Did you yourself ever interpose—excuse me, withdraw that. Did you yourself, Mr. Saden, ever inject yourself into reducing the number of town lines which were cut in the development of the House plan? A. Well, to the extent that I had told Mr. Collins and Mr. Orcutt that I wanted to try to keep that at a minimum I did interpose myself, at a reasonable minimum, but you're trying to create basically a fair plan and you've got to [32] create in the first element of fairness the one man, one vote theory. The other things are attached on to it but I think

just to maintain the town lines and develop an unfair plan would certainly be undesirable.

Q. What do you mean by fairness in this case? A. Fairness is a plan that will meet the one man, one vote test and will reflect the vote on the Senate and House lines in the elections in this relatively same percentage proportion, both in control of those Houses as they reflect the plurality of the vote on the total Senate and House lines in the State and not the great disparities that you have under the reapportionment plan for which incidentally Mr. Parskey was largely responsible back in 1964 when—

Q. You answered. You don't have to—all right. A. Well, if you want I know a little of that history and that's why I'm telling you.

Q. I don't think I asked you that question, however, on what he did in 1964. That's not my question. A. I know you wouldn't want to get into that probably but go ahead, Bob.

Q. Did you ever tell Mr. Parskey once in the course of your deliberations with him that as long as you were required to cut some town lines in the creation of districts for the House of Representatives [33] it didn't make any difference how many town lines were cut? A. No, I never told him that.

Q. Were you concerned with the number of segments of towns apart from the number of town lines which were cut which were added to other towns to form districts? A. Yes, I wanted to—I didn't want to break up into any more segments than were necessary, reasonably necessary, any given town if it could be done. I realized in some cases you had to do it.

Q. How many town lines did you cut in the House plan? A. I think if my recollection is correct there were about forty-seven on the House plan, I think it is, it's maybe one or two more one way or the other.

Q. And how many segments of towns, and by segment I mean a portion of a town, was added to another town in the forming of Assembly districts? A. I don't have that

figure offhand in mind. I recall we did prepare something that indicated whether a town was split once or twice, but I don't remember what the figures are on it. It didn't impress me as being overwhelmingly out of whack.

Q. Well— A. At the time.

Q. Would you feel it was out of whack if I told you that there was seventy-eight segments of towns which were [34] added to other towns in the forming of Assembly districts? A. Well, I don't know that as a correct figure. I'd want to check the figures to be sure before I express any opinion on it.

Q. Did you make any—at the time that you were creating this plan and at the time you approved it had you made any analysis of the number of town lines that were cut in the forming of Assembly districts. A. I remember I did check the number of town lines in both houses. I remember we had, I think it was either twenty-three to twenty-five in the Senate and something around forty-seven in the House.

Q. And did you add up the number of segments of towns? A. Well, how do you—

Q. All right, let me define segments. A. How do you define segments?

Q. That's a fair statement. Let me define my terms before I ask a question. A. If you can take a piece of a town and put it in with another town and thereby maybe you call that two segments or is it one split town? I don't know how you—it's a little bit peculiar trying to work out.

Q. All right, let me try to define it because you have a right to be uncertain as to what I did mean. I define a segment to be a portion of a town which is added [35] to another town in the forming of an Assembly district. Now a town line is cut obviously when a segment is created but a town line—maybe a single town may have more than one portion of it segmented by a portion of it being added to a portion of another town in the creation of the Assembly district. A. I'm not sure whether I followed you all the way on that.

Mr. McCarthy: I lost you on the second turn.

By Mr. Satter:

Q. Let me start all over again. Town A has a portion of it which is added to Town B to form an Assembly district. That is the cutting of the town line of Town A. Okay. Is that clear? A. Yes.

Q. All right. Now if that same Town A has another portion of it which is added to Town C to form another Assembly district that is another segment of Town A and although the town line of A has been cut it has been cut on two occations to form Assembly districts. That's what I mean by segments which exceed the cutting of town lines. Is that clear? A. I think I follow you on that.

Q. Okay. Now did you make a calculation of not only the number of town lines which were cut but also the number of segments of towns which were added to other towns [36] to form Assembly districts. A. Yes, I remember having a schedule of that nature. I think I referred to it as whether a town was cut once or twice. I don't remember what the totals came to now as I sit here but they didn't seem to me unreasonable at the time.

Q. Do you know what the percentage deviation from the mean was of all of the districts for the House of Representatives? A. Well, my recollection is that the average deviation in that House was less than two percent as it finally worked out and that the maximum deviation above the norm and below the norm was less than four percent above and less than four percent below, something like three point eight or three point nine above and about the same amount below. In terms of numbers I think it ran something like seven hundred and seventy-five population maximum or minimum, somewhere in that range.

Q. Are you familiar with the fact that if you raise the percentage deviation above the plus or minus four percent that you could reduce the number of towns which were—town lines which were cut and the number of segments of towns, segmenting of towns? Are you familiar with that

elemental fact? A. Do you mean if you increased the deviations [37] that you would have fewer town lines cut?

Q. Yes. A. I'm not sure that that is correct but if it were—

Q. Well, I'm just asking you whether you are familiar with that elemental fact. A. With that elemental fact?

Q. Yes. A. You're giving it to me as a fact and I don't know it to be a fact. That's the whole point. My only comment I can make on that, Mr. Satter, is that it seems to me that would be flying in the face of the one man, one vote principle if you tried to increase deviations. I thought that the primary and essential factor behind the whole reapportionment scheme is to keep the deviations as low as reasonably possible.

Q. But were you aware of the fact that if you had increased the deviations you could have reduced the number of town lines which were cut and the number of segments of towns? A. I can't say that I was aware that we would essentially improve the situation if we increased deviations to any substantial extent or any extent above what we had them.

Q. Did you make any attempt to experiment with a larger percentage deviation resulting in a fewer number of town lines cut and fewer segmenting of towns? [38] A. I personally did not. I am not sure whether—I know I discussed the proposition very generally with my volunteer two man staff but the conclusion that I got was, that I had in my own mind was it wasn't going to do a great deal of good and there were time limitations involved. In trying to test all the large number of plans you could probably evolve if you wanted to sit down and try to evolve plans you could evolve probably hundreds of them but trying to do them all and to take into consideration factors that we were concerned with I don't see how you could do it.

Q. Did you instruct your volunteer assistants to increase the deviation and to reduce the number of town lines cut and segmenting of towns? A. I never instructed them to

increase the deviations. My objective was the opposite of that.

Q. Do you have any opinion as to how many town lines would have to be cut if, for example, the deviation instead of being plus or minus four percent were plus or minus five percent. A. I couldn't tell you offhand.

Q. Did you make any analysis of the basic data in order to determine that fact? A. I recall just discussing it but we didn't make—I at least didn't make any specific analysis along those [39] lines because I felt that the plan that we had met all of the requirements.

Q. Now are you familiar— A. I might point out also that apparently it was satisfactory to Mr. Parskey except as he indicated to me, as I told you for one or two small changes if we had been able to agree on the Senate plan.

Q. Now on the board plan are you aware of the fact, for example, that the Town of Killingly, the town line of Killingly was cut?

Mr. McCarthy: If you remember.

By the Deponent:

A. I don't remember. I'd have to see a map to tell you.

Q. Would you be willing to accept this as a fair representation of the board plan as to—excuse me—

Mr. Hultgren: You are saying that it is, Bob, I take it?

Mr. Satter: Yes, I'm stating it is.

Mr. Hultgren: All right.

By Mr. Satter:

Q. But what I am about to show you which I think I will put in as an exhibit is a fair representation of district, House district, Assembly district 51 and 50 indicating that the Town of Killingly is cut? [40] A. Did you draw this or did Tom draw it?

Q. Tom drew it. A. Well, I have no independent recollection at the moment but if you tell me that's the way our plan works out all I can tell you is it's cut.

Q. Well, let me get at the plan itself in order for you not to—I show you in the plan itself which we will introduce a copy of this but will you agree that what I am showing you is the board plan. A. This was photostated from the copy filed in the Secretary of State's office, was it?

Q. Yes. A. Yes, it looks like it. I can remember a couple of hand changes we had to make at the last moment on a number of maps and some of these references here. This looks like it.

Q. All right. Now I show you in the plan itself the description of House district, Assembly district No. 50 and No. 51 and call your attention to the reference to a portion of the Town of Killingly in Assembly district No. 50 and Assembly district No. 51. Do you see those? A. Yes.

Q. Would that refresh your recollection that the Town of Killingly was cut? A. Yes, there is no question it was cut.

[41] Q. Now was any attempt made to avoid cutting the Town of Killingly by redesigning House districts No. 50, 51 and 52? A. I don't recall any specific effort as far as Killingly was concerned in that direction.

Mr. Satter: I show you. Excuse me, let me submit this.

(Map of Killingly introduced as "Plaintiff's Exhibit A for Identification".)

By Mr. Satter:

Q. I'd like to show you then, Mr. Saden, an alternative to districts 50 and 51 and 52 involving the same geographic area and keeping the population deviation of these districts within the same perimeters of less than three point nine three percent and ask you whether or not this would not have been a feasible way to have assigned these districts in order to avoid the cutting of the Town of Killingly. I point out to you, Mr. Saden, that the changes between the board plan and this alternative district would be in district No. 50 to have not cut the Town of Killingly and to have in the alternative you would not cut the Town of Killingly, you would take off the towns of Ashford and Chaplin and add

them to Assembly district No. 52 and you would add to Assembly district No. 51 the Town of Woodstock, and I wondered whether you [42] would have considered such a change in exactly the same geographic area of the State so as to avoid the cutting of the Town of Killingly. A. Whether I considered such a geographic change?

Q. Yes. A. I don't have any specific recollection of having considered such a geographical change. I think that as I tried to point out to you before there are a number of secondary factors and third factors, if you want to call them that, that I think need to be considered. I don't know how this kind of a change would reflect upon the over-all fairness of the plan that I was trying to propose in terms of what I mentioned before, in terms of being a part of the whole picture reflecting the vote on the House line in the elections of the last—the last three elections, '66, '68 and '70. I don't think you can just consider these individual changes abstractly without putting the whole picture together. I don't have—my answer to that is that I don't recall specifically having considered that specific breakdown.

(Off the record discussion.)

Mr. Satter: I would suggest that you make that Plaintiff's Exhibit A-1 because I want to relate it to Plaintiff's Exhibit A for Identification. I assume nobody has [43] any objection to that.

(Alternative to the first plan marked "Plaintiff's Exhibit A-1 for Identification.")

By Mr. Satter:

Q. Mr. Saden, if you accept my representation to you that the population of each of the Assembly districts 50, 51 and 52 would remain within the same deviation as provided for in your plan what other factor would preclude you from correcting the plan so as to eliminate the cutting of the Town of Killingly? A. Well, as I mentioned to you before the plan that I submitted to Mr. Parskey, who was

presumably representing the democratic party position, seemed to be satisfactory to him except for one or two changes which he never specified beyond the Ruby Cohen district; and secondly I think that you cannot look at these plans piecemeal without taking into consideration as a third factor the over-all political composition of a plan. The present reapportionment plan, or the one in existence prior to this one, is competely lopsided for that very reason, when you get the kind of representation in both Houses that you have had in '66 and '68 and '70 which are way out of whack compared to the actual plurality of vote in favor of the party in control in those three elections; this is a factor toward the development of a [44] fair plan. It is a corollary to the idea of the one man, one vote theory. The effectiveness of any man's vote who votes for the minority in an election is diminished if he is being swamped in representation in the House or the Senate because of some arrangement of districts that don't give him a voice or the proportionately equal voice that he should have. It's conceivable, for example, that you could have—take an extreme situation where every district in the State is won by one vote by one party or the other, and in that event there would be no representation for the very substantial minority number of electors who voted in that election. You would have a complete sweep of representation. Now that to me is effectively defeating the one man, one voice theory, is a largely disproportionate population arrangement.

Q. In other words is it fair to say then that in your development of these districts as it would be illustrated by Plaintiff's Exhibit A and B—

Mr. Beizer: You mean A and A-1.

By Mr. Satter:

Q. A and A-1, excuse me, where I have shown to you, where Plaintiff's Exhibit A which is the board plan shows the cutting of the Town of Killingly, Plaintiff's Exhibit B-1 shows to you a rearrangement of Assembly districts 50, 51 and 52 to eliminate the cutting of the [45] Town of Killingly but still keeping these districts within the same popu-

lation deviation of approximately three point nine percent, that nevertheless another factor that you considered in creating these districts was the achievement of a fair representation based upon party vote. A. Based upon the vote in the election, yes, it would be a factor to be considered. These are all matters—I might add these are all matters of judgment and estimate and I had no way of making any hard and fast rule. I hope my judgment on these things was correct but in terms of what the ultimate political impact will be in the next election there is no way that I can see of anyone's positively saying that if you cut it that way that district is going to vote that way.

Q. I understand that. A. These are matters of pure estimate.

Q. I show you another section of the State relating to Assembly district 68 and 69 in which the the Town of Watertown is cut and I ask you to look at the plan to verify the fact that in fact the Town of Watertown is cut in those two districts. A. What, 68 and 69?

Q. Yes. A. Yes.

Q. Do you observe in the plan that in fact the Town [46] of Watertown was cut? A. Yes.

Mr. Satter: I would like to then submit this map of Watertown.

(Map of Watertown marked "Plaintiff's Exhibit B for Identification.")

By Mr. Satter:

Q. I show you then an alternative to those districts 68 and 69 affecting also 67 and 64, again covering precisely the same area of the State in which the Town of Watertown is now not cut but contained wholly within the 68 Assembly district, but there is added to that Assembly district the Towns of Warren in place of the section of Watertown, and in Assembly district 69 in place of a section of Watertown there is added the Town of Roxbury—withdraw that. I show you an alternative plan affecting Assembly districts

68, 69, 67 and 64, which eliminates the cut in the Town of Watertown by, in Assembly district 68 taking the whole Town of Watertown and eliminating Woodbury, 69 having no portion of the Town of Waterbury but including picking up Roxbury in 67 and Woodbury, and 67 picks up the Town of Warren, and 64 and 64 Assembly district—Assembly district 64 contains the Town of Warren. Now here is an illustration of again covering the same portion of the State in which by keeping within [47] the same percentage deviation the Town of Watertown has avoided the cut and ask you whether or not that was not considered by you first? A. It was never presented to me even by your associate here, Tom, who was working on these papers all last summer, and I have no specific recollection of ever having considered and I would give you the same answer that I gave you on the previous situation that I mentioned with Killingly.

Q. Which is the factors to be considered were not only the equality of population and not only the cutting of town lines but also the fact of election results, is that correct? A. Of getting a fair plan.

Q. Of getting a fair plan which reflected election results? A. Which took into consideration election results, not solely keyed to them but took them into consideration.

Q. But where, Mr. Saden, an alternative is presented of eliminating a cut of a town line and where there is presented a population deviation within the percentage deviation of the plan then doesn't the only factor that justifies the town cut become the achievement of this so-called fair representation based upon election results? [48] A. I think that that is probably so, that it's far more important to have a fair plan than to preserve a town line, speaking in federal terms.

Mr. Satter: Would you put that in? I'd like to have this in, the alternative.

(Alternative to Watertown plan marked "Plaintiff's Exhibit B-1 for Identification.")

By Mr. Satter:

Q. Mr. Saden, I show you a map of the board plan which related to Assembly district 37 which is in the Colchester area—excuse me, I'm sorry—Assembly district 37 which is in the Salem-Montville area, 48 which is in the Colchester area and 45 which is in the Griswold area, and I ask you to look at this map which I will put into exhibit and also look at the plan itself and observe that with respect to the Town of Montville it is cut twice or segmented twice in the forming of Assembly districts—excuse me, segmented three times in the forming of Assembly districts. Let me relate this to you by showing you the sections of the plan to refresh your recollection. A. Well, that isn't the way we defined segmentations before, was it? You said—I remember your illustration of Town A and Town B. If you took one piece and added it to another town that would be one segment. If you took [49] another piece and added it to Town B there would be another segment.

Q. If you take another section and add it to Town C you would see a third section. A. You never said that before. The main part of the town is still in it, a unit by itself. If you want to call it that you can call it anything you want.

Q. Well, there isn't—Montville itself—no Assembly district in the Town of Montville is contained wholly within the Town of Montville, is it? A. No, no Assembly district in and of itself is contained—Montville is not contained wholly within any Assembly district.

Q. Then I would consider that segmentation within our definition. Now I want you first to confirm the fact that the Town of Montville is segmented into three different Assembly districts. I call your attention first to Assembly district 37 which related to a portion of the Town of Montville, to 45 which again related to a portion of the Town of Montville, and to 48 which again relates to a portion of the Town of Montville. A. I think this, if I recall—

Q. Is that—first, are our facts correct, that the Town of Montville is divided and forms a portion of three different

Assembly districts? [50] A. Yes, on the basis of the plan I think—

Q. Do you want to refresh your recollection? Look at the plan itself. A. Yes. Well, you just went over it with me. Let me just check that again to be sure.

Q. All right. A. Yes.

(Map of Montville marked "Plaintiff's Exhibit C for Identification.")

By Mr. Satter:

Q. Now did you, Mr. Saden, consider at least attempting to reducing the segmenting of the Town of Montville from three segments to two segments by changing Assembly district 37 to include the Towns of Colchester, Salem and East Lyme, and Assembly district 48 to include the Towns of Lebanon, Bozrah and Montville as a way of reducing the segmenting of the Town of Montville. A. I have no specific recollection of having attempted to make this exact change that you present to me now.

Q. But would your answer essentially be the same as it was with respect to the immediate previous Assembly districts that I have referred to? A. I have said to you before that I don't think you can simply take these things in isolation and not [51] consider all of the factors involved. I don't, for example, know what political factors you're taking into consideration, Mr. Satter, in forming these districts, whether you are or not, but essentially my answer is basically what I have told you my whole purpose was in the drafting of the plan in the first place.

Q. And, Mr. Saden, if I were to tell you that I have no political considerations other than that of retaining the same population deviation as in the plan and simply reducing the segmenting of towns as required by the State constitution. A. If you were to tell me what?

Q. If I were to tell you that would affect your concern about my submission to you of the alternative? A. I'm

afraid I wouldn't be able to accept it, Mr. Satter, because you have been very deeply involved in this from a partisan point of view from the beginning, as you know, and I wouldn't be able to accept that without checking it out to my own satisfaction.

(Alternative map of Montville marked Plaintiff's Exhibit C-1 for Identification.)

Mr. Satter: Maybe we ought to mark this right off as Plaintiff's Exhibit D and D-1.

(Two more maps marked "Plaintiff's Exhibits D and D-1 for Identification" respectively.)

[52] By Mr. Satter.

Q. Mr. Saden, I show you Plaintiff's Exhibit D and D-1 which is a colored map of the sections of the Town of—well, it's a colored map of the House districts of the Town of North Haven and of Hamden, and ask whether you can recognize that the Town of North Haven is cut virtually in half to form Assembly district 87 and part of 88, and observe that the Town of North Haven—excuse me, and observe that Assembly district 87 takes in a portion of the Town of Hamden and the Assembly district 88 takes in a portion of the town also of North Haven and of Hamden. A. Well, I'm a little confused by this map. I'm not too familiar with it. What do you call—where is Hamden? Where is North Haven?

Q. This is Hamden, this portion. A. You mean D-1 is Hamden?

Q. D-1 is Hamden, D is the entire Town of North Haven. Assembly district 87 is this purple, Assembly district 88 is this red. A. Which is 88?

Q. The red here, this and this. A. These are two different colors of red you're talking about, is that right?

Q. That is right. [53] A. And these are two different colors of purple?

Q. Yes, but they are the same district. This is Assembly district 91.

Mr. McCarthy: Pointing to the yellow.

By Mr. Satter:

Q. All the yellow is 91 and the blue is Assembly district 89. Is that right?

Mr. Vocelli: Yes.

Mr. Satter: Which also includes the Town of Cheshire?

Mr. Vocelli: Part of it.

By Mr. Satter:

Q. Do you remember those districts? A. Well, I don't have any minute specific recollection of them. I don't understand. What is the crosshatched red here?

Mr. Vocelli: That outlines Senate portions. In other words, all the red is one district, all the purple is another district. That's just the Senate mish-mash.

The Deponent: And what is this blue crosshatch?

Mr. Vocelli: Again that's part of the Senate mish-mash, just shows which, this part is in one Senate district, this part in another [54] Senate district, so you can avoid the slanted lines for the discussion of the House.

The Deponent: Then what are we talking about? The red area?

Mr. Satter: Talking about the purple areas which is 87, the red area which is 89.

Mr. Vocelli: 88.

By Mr. Satter:

Q. The yellow area which is 91 and the blue area which 89. A. And you're talking about three Assembly districts then?

Q. Four Assembly district, one, two, three, four. A. Okay.

Q. Okay? A. All right.

Q. Now do you observe, Mr. Saden, that first that North Haven by the board plan is divided into two parts and each portion is added to the Town of Hamden to two almost equal portions each portion of which is added to the Town of Hamden? A. Which portions are you referring to? The red portions?

Q. Red is added to this district? [55] A. Yes.

Q. And the purple is added to District 87. This is the Town of Hamden. This is the Town of North Haven. A. On these maps I see that, yes.

Q. And you observe that in the Town of Hamden that the District 91 is shaped as it is shaped? A. Yes. I assume that these are accurate or reasonable accurate shapes. I don't have any personal knowledge of the exact shapings of this map but I assume that you have drawn them reasonably accurate.

Q. Now you observe then that the Town of North Haven has two segments, a portion of each segment in the Town of Hamden? A. Yes.

Q. And you observe that the Town of Hamden has one segment entirely within the Town of Hamden, one segment which is added to the Town of Cheshire, one Assembly district which is added to an Assembly district in North Haven and one Assembly district which is added to the Town of North Haven, correct? A. I think that's this crosshatch.

Q. Again the crosshatch ignore, Mr. Saden, because that related to Senatorial districts which are not relevant to this question. A. Well, this crosshatched section and the blue [56] is part of this.

Q. Is part of one district. A. All right.

Q. In other words, that there are now created in these two towns a total of six segments. The Town of North Haven is divided into two segments since no Assembly district is wholly within the Town of North Haven, isn't that correct? A. Yes, on these maps that's right.

Q. And that the Town of Hamden has a segment which is added to the Town of North Haven, a segment which is added to the Town of North Haven and a segment which is added to the Town of Cheshire and one segment wholly within the Town of Hamden, correct? Now what I ask you is did you consider or did your board first of all—withdraw the question. Did your board consider reducing the segmenting of these towns of North Haven and Hamden in order to achieve exactly the same population deviation and achieve the other objective of reducing segmentation. A. Well, I think the answer is essentially the same as I have given you before. We considered keeping the breaking of town lines within as reasonable limits as we could but where there were other considerations of fairness that overrode that I did not insist the town lines be maintained exact.

[57] Q. Did you consider, for example, a plan which would be an alternative to the board plan which would divide a district in North Haven wholly within the Town of North Haven, two districts wholly within the Town of Hamden, and one district in the Town of Hamden and North Haven and in that portion of the Town of Cheshire. A. No, I have no specific recollection of having considered that plan that you have shown me.

Q. Would you consider such a plan to be more desirable than the board plan? A. I can't say without considering all the overall factors, Mr. Satter.

Q. And if I told you that the factors that the alternatives—excuse me. I better introduce this.

(Alternative map marked "Plaintiff's Exhibit D-2.")

By Mr. Satter:

Q. If I told you that the alternative plan kept the same number districts within the same deviational limits as the board plan and reduced the cutting of town lines by retaining within the Town of Hamden two districts wholly within the town and reduced the number of towns segmented from

six to three would you consider that an important desirable alternative than the board plan?

Mr. Hultgren: I'll object to the form of [58] the question. I don't think that is according to the facts.

Mr. Satter: Well, you tell me where the facts differ.

Mr. Hultgren: Well, you still have North Haven divided into two portions, it still takes in part of Cheshire, and there may be one or two factors but this is not three, certain. It's one, two, three, four.

Mr. Satter: No, it isn't. This stays wholly within the town. You don't have a district which cuts a town line in 87. North Haven has a district wholly within the town line. Hamden, 88, which is a portion of North Haven, stays wholly within the Town of Hamden. 91 stays wholly within the Town of Hamden and 89 which is already in the Town of Cheshire, it's true, takes this. That's what I say—

Mr. Hultgren: Takes Hamden and also part of North Haven.

Mr. Satter: But one district, that's right, but that's different than the other one. Could you repeat that question?

(Whereupon, the last question was read by the Court Reporter.)

[59] By the Deponent: Not necessarily.

By Mr. Satter:

Q. Why? A. For the same reason I have given you before. That doesn't necessarily prove that this is the most desirable plan looked at from the point of view of the whole picture.

Q. Now, Mr. Saden, did you at all consider that the shape of these districts made any difference? A. Within certain limitations I think shape was some consideration but not a very important one.

Q. How about compactness? Was that a factor that you considered at all? A. We considered it but didn't

give it the same weight that I would give the deviation factor or the same weight that I would give the town line factor, the over-all fairness of the plan in terms of voting pattern.

Q. Do you consider that— A. I think in this day and age compactness has lost a lot of significance, especially in a small state like Connecticut, where in the old days if you had to go horse and buggy over a district it meant something probably but today the transportation being what it is compactness in and of itself doesn't seem to have the greatest virtue in the world.

* * * * * * * * * *

[60] can achieve it but if you can't I don't think it's world shaking.

Q. Did you consider the Assembly district No. 91 which is marked 91 on Plaintiff's Exhibit D-1 in the Town of Hamden, did you consider the shape of that district desirable? A. I think it's desirable. I think if you look at the shape of the district you suggest in your own plan, D-2, it's pretty odd looking. You have one district there that's pretty odd looking, isn't it?

Mr. Satter: Well, I think we will recess here.

(Recess at 4:37 P.M.)

(Deposition reconvened at 4:50 P.M.)

By Mr. Satter:

Q. Mr. Saden, I show you a map of the districts of the Town of West Hartford.

(Map of West Hartford marked "Plaintiff's Exhibit E for Identification.")

By Mr. Satter:

Q. Showing Assembly district 18, 19 and 20. Are you familiar with those districts? A. Do you mean I have a present specific recollection of the shapes of these districts? The answer is no.

Q. If we are able to establish that these are in [61] fact a true pictorial or reasonably accurate pictorial description of these districts will you at least accept the fact that they are an approximation of it? A. Yes, I will accept your representation that they are. This is one of the representations from you I will accept.

Q. Now, Mr. Saden, can you give me the explanation as to why Assembly district 19 is of the shape it is as shown on Plaintiff's Exhibit E? A. Well, it's part of the picture of putting together the pieces from the census map which as you know come in many odd shapes and I think this achieved a pretty good population mix on those three districts that are wholly within the town.

Q. And do you claim that based upon the census data that was then available to you that you could not make a more compact and rational shape to these districts? A. Well, when you start using the word compact, nobody has ever really given a real definition of that word and so your assumption of what is compact may be different from mine and I don't think for that reason that the question is fair.

Q. Well, can you explain why the Assembly district had to make these curlicues in the boundary line of Assembly district 19, for example, had to make all of the devious [62] cuts and curlicues that it appears to make?

Mr. McCarthy: Object to form. Devious represents a judgment.

Mr. Satter: Yes, I withdraw the question. Thank you, Mr. McCarthy.

Q. (By Mr. Satter) Can you explain why the boundary lines of Assembly district 19 had to take the number of different cuts and turns which it appears to take in this exhibit? A. Well, it fit into an over-all pattern of all the adjacent areas plus, as I say, the problem of putting together jigsaw pieces of the census maps themselves, the census data.

Q. And I show you an alternative to these Assembly districts 19, 20—excuse me—18, 19 and 20 and ask you whether—if you will accept the fact that these, this alternative, falls within the same population deviation, retains the Assembly districts within the same town, whether or not such an alternative would not be a more rational shape of these Assembly districts 18, 19 and 20? A. I am not going to accept any facts about the population or anything else. If you want to ask me whether this looks better on a piece of paper in terms of drawing lines I would have to say that it does look [63] better on a piece of paper, but there are so many other factors to be considered that are more important that this does not reflect.

Q. All right. What other factors went into its consideration? A. I have been all over this before. I have given you the answers.

Q. What other factors went into the consideration of the shape of Assembly district 19? A. I have given you as much of an answer as I can.

Q. Which is again what and briefly. A. The problems of putting together the jigsaw puzzle from the data of the census bureau, the problem of maintaining the population equality as reasonably as close as we could, the problem of creating an over-all fair plan which would not weight the plan for either political party as many of your suggestions I am afraid are seeking to do. All these factors went into the formation of the plan that I suggested and to try to take this piecemeal the way you are now isn't a fair way to approach it as I see it.

Q. And how much, Mr. Saden, did pure partisan politics, for example, go into the formation of the shape of Assembly district 19? A. Pure partisan politics did not enter into the [64] formation of district 19 or 18 or any of the other districts involved. We considered and I instructed Mr. Collins to consider the over-all picture in the whole Senate and the whole House and I told you before what my objec-

tives were. Now I can't give you anything more than that, Mr. Satter.

Q. Were you aware of the fact that—withdraw the question. A. I might add one thing, that there was a plan, as I mentioned before, that Mr. Parskey gave me, a so-called block plan on this House which he had not worked out, the districts had not worked out. This particular West Hartford district or any of them. Simply threw it in my lap and said, "Work it out any way that you want to work it out," and upon working it out we found that even in 1970 the Democrats would have had control in the House by a plurality of at least 21 or 22 people even though they lost the plurality vote in the House in 1970. Now that is not my conception of what a fair plan accomplishes because it deprives the minority group or the majority group in that instance, of the full force of the one man, one vote theory.

Q. And so is it fair to say, Mr. Saden, that the cuts and the curlicues in Assembly district 19, for example, were made in order to achieve where—excuse me—where [65] they could have been eliminated by straight lines and still keeping within the same population deviation, were done in order to achieve this fair representation which you have been talking about. A. They were in part. That was the reason, undoubtedly. I don't have a specific recollection of West Hartford as you show it to me today. I couldn't possibly recall every one of these towns on this map.

Q. Do you have data on the basis of which you can refresh your recollection? A. I would doubt it. I haven't been able to scrape up very much in the way of any papers that I had left over from last summer. I didn't have too many to begin with. I thought most of them were up here but I don't believe there are any more as far as I know. I don't know.

Q. Who in fact designed West Hartford? A. I beg your pardon?

Q. Who in fact designed the districts within West Hartford? A. Well, it would be Mr. Collins or with Mr. Orcutt's

assistance probably. I'm not sure which one of them. Both of them, perhaps.

Q. How closely did they work with the incumbent legislators in the designing of these districts? [66] A. I have no idea. I can't answer that at all as far as I know. I know nothing of that actually. You'd have to ask them. I don't even know who the incumbents are in West Hartford in the House.

Q. If I told you that Assembly district 19 was Lenge would that— A. Lenge?

Q. Yes. Would that refresh your recollection as to the considerations that went into the designing of that district? A. No, it wouldn't.

(Alternative map of West Hartford marked "Plaintiff's Exhibit E-1 for Identification.")

By Mr. Satter:

Q. I show you a map of the board plan for the districts in the Town of Manchester, Assembly District 13 in orange and 12 in yellow, and I will put this in as an exhibit and ask you how you can justify the shape of those two districts? A. I don't think there is any need to justify the shape of the districts, Mr. Satter.

Q. You don't feel it's necessary to justify a shape of a district which is virtually a doughnut with the middle cut out forming one district? A. Well, that's your description of it. I don't [67] think I need to add any more to the answer than what I have already told you about these previous districts you have been questioning about.

Mr. Satter: All right, I'd like to have this marked as an exhibit.

(Map of Manchester marked "Plaintiff's Exhibit F for Identification.")

By Mr. Satter:

Q. Again relating to Assembly districts 13 and 12 in the Town of Manchester I show you an alternative plan which

has exactly or virtually exactly the same population for each of these districts and ask you whether or not you don't believe that that is shaped more rationally than the board plan? A. No. It has its own peculiarities. They are different but they are still peculiar.

Q. Show me what you mean by peculiarities. Excuse me, let me mark this exhibit.

(Alternative plan for Manchester marked "Plaintiff's Exhibit F-1 for Identification.")

By Mr. Satter:

Q. All right. Show me what you deem to be the peculiarities of an alternative to Assembly district—the shape of Assembly district 12 and 13 on the alternative as shown—excuse me, let me finish it—show me the [68] peculiarities you observe in the boundaries of Assembly districts 12 and 13 as shown on Plaintiff's Exhibit F-1 as compared with the board boundaries as shown on Plaintiff's Exhibit F? A. Well, I said that it has its own peculiarities. They don't compare in the sense that the shapes of the districts are different and they both have their peculiarities. Yours does. 12 has a real jagged edge all around it. The top part of 13 has its own jagged edge. Now there are peculiarities on F but I didn't conceive that we were primarily concerned with drawing pretty pictures in forming a plan of reapportionment.

Q. And in making the kinds of shapes which you made in Assembly districts 12 and 13 the partisan considerations of achieving this fair representation I presume dominated? A. No, it did not dominate and it is your use of the language that makes it obvious, Mr. Satter, that the answer to that question is no. I have told you what I have considered in the formation of the entire plan and that is true of everything, the parts as well as the whole.

Q. Mr. Saden, I show you a map of the board, Senate district 9, and particularly ask you to observe the location of

the Town of Farmington in that district. A. Yes, I observe it.

Mr. Satter: Do you have any—let me [69] mark it first.

(Map of Farmington marked "Plaintiff's Exhibit G for Identification.")

By Mr. Satter:

Q. Do you observe that in the board plan Senate district nine goes from Berlin, portions of the Town of Rocky Hill, Wethersfield, Newington, and the Town of Farmington? A. Yes.

Q. Do you know how many people actually live in that—excuse me, withdraw the question. Do you know what the land area is, the connecting boundary line between Newington and Farmington, do you know what the length of that line is? A. I don't know the length of it but it's obviously not very large.

Q. Did you ever inquire? A. No. As a matter of fact, I recall that this district is very similar to the one that you drew in the so-called Commission Senate plan that was supposedly about to be agreed upon but they never did get it agreed upon but I think it's almost identical and it ties in either all or part of Farmington with the same land bridge that you have there. A. I will ask you again the question. Do you know [70]what the length of that line is? A. I don't know. It's small.

Q. Would you say it's less than a thousand feet? A. I don't know. I didn't go out and measure it, Mr. Satter.

Q. Did it concern you that there would be that strained contiguity in that district? A. That what?

Q. That there would be such a strained contiguity in that district. A. That's your description of it. I don't think it's a vital factor, no.

Q. Do you know whether or not any people live in this particular area connecting the Town of Newington with the Town of Farmington? A. No, I don't, offhand.

Q. Was it in the intent in making the shape of that district, Senate district 9—excuse me. Withdraw the question. Was it the intent of making Senate district 9 that shape in order to assure that it shall be a Republican district? A. No, it wasn't the primary intent to assure that it would be a Republican district. It was part of the larger picture and it fitted into that larger picture.

Q. And the larger picture was what? [71] A. The achieving of a Senate plan that would respond to the kind of vote in the State on the Senate level in a given year in some proportion to the pluralities that occurred in those votes. That was one of the factors.

Q. I show you a map of the board's Senate districts 29 and 35. Do you recognize that district, those districts? A. Well, roughly I recognize it generally, I'd say, yes, I recognize that. The specific details of it escape me.

Q. What was the primary consideration for taking the Town of Mansfield, a portion of the Town of Mansfield out of the 35th district and putting it into the 29th district? A. Well, one of the reasons was to have, as I say, the over-all factor here was the population factor, but we also wanted to try to maintain some kind of reasonable balance which would require districts that were not overwhelmingly either democratic or republican in some areas of the State judged by the election results of the last three elections for the General Assembly.

Q. Wasn't the primary consideration to take that portion, excuse me, the portion of Mansfield that was taken out of the 35th and put into the 29th is the Town of Storrs, is it not, the northwest corner of the town, [72] portion of the Town of Mansfield. A. Well, Mansfield includes Storrs, I believe, doesn't it?

Q. Yes, and the portion of Mansfield that was put into the 29th district included the section of Mansfield known as Storrs? A. Part of it, yes, that is correct.

Q. And was it your calculation that the Town of Storrs was primarily a democratic area. A. Based on the elec-

tions of the General Assembly probably that would be a considered estimate I would make of it, yes.

Q. And wasn't it the purpose of this, of including, of segmenting the Town of Mansfield and putting it into the 29th district in order to make the 29th district a completely safe democratic district and overpopulating it with democrats in order to make the 35th district have a good chance of going republican? A. No, that wasn't the purpose of it.

Q. Well, would you not have a more rational shape of that district if you had included Mansfield within the 35th district then and prevented the jutting up of the 29th district like a finger into the 35th? A. I don't accept that definition of rational [73] as being true.

Mr. Satter: Well, I'd like to put that in.

(Alternate plan of Mansfield introduced into evidence and marked "Plaintiff's Exhibit H-1 for Identification.")

By Mr. Satter:

Q. Looking at the shape of the 29th in the alternative which is H-1 and the board plan, would you not accept the fact that the 29th is in that alternative Plaintiff's Exhibit H-1 for Identificatio[n] a more compact district than the board plan? A. I th[ink] the whole question revolves around your definition of co[m]pact, Mr. Satter, and there are courts and individuals that have a multitude of different opinions about compactness s[o] I cannot agree with you that your assumption that one plan here, one suggestion here is more compact than the oth[er] is correct. And I add to that what I said before that co[m]pactness today in a small State like Connecticut is where transportation is so easy, communication is so easy, is and [o]ther factor that would enter into a picture and was one.

Q. And it was on[e] of the factors which led you to dissect the Town of Mansfield? A. What was one of the factors?

Q. I say and was one of the factors which led [74] you to dissect the Tow[n] of Mansfield that of achieving this so-called fair repre[sen]tation and the balance of partisan

political vote? A. Well, if you delete the word partisan I might be able to answer that question. I think one of the factors, one of the overriding factors in the whole plan, and this required a consideration of the different parts of the State to give some thought to a plan that wasn't overproportioned in favor of one party against the other when the vote didn't warrant it.

Q. And how have you analyzed the results of your board Senate plan in terms of a reasonable breakdown of the two party representation? A. The board Senate plan based on the results in '66 would have resulted in a victory for the democrats in the Senate not by a 25 to 11 margin as they won it in '66 but by something closer to 20 to 16 which would be more appropriate with, I think they had a plurality of something like fifty-four percent, in that range of the vote, instead of getting seventy percent representation in the Senate.

In '68 my recollection there of the Senate was 24 to 12 for the democrats and this plan would have gone democratic in the Senate again in '68 but not by a sixty-six and two-thirds percentage against approximately a fifty-two percent plurality of the vote. And in 1970 this plan would have gone republican as I estimate it by a small number for the republicans. There are other outside factors but you can't—it's difficult to evaluate—that will reflect itself in the future but I think you've got to keep in mind that 1970 was a year in which a republican governor was elected for the first time in sixteen years in this State. The democrats have dominated the political scene for the past sixteen years so that 1970 isn't really a typical year in any sense of the word.

You've got the other factor of what impact the eighteen year old vote will have in the future which is not reflected in the last three elections of the General Assembly. There are all indications as of the present time that seem to show that the registration, at least democratic registration is exceeding the republican something like two to one or three to one and—

Mr. Satter: I could go on but I don't think it will serve any purpose just to have you repeat on each of these districts essentially the same basic position which you essentially have taken so I would terminate my inquires.

Mr. Hultgren: I have no questions.

[76] Mr. McCarthy: No questions.

Mr. Lapp: No questions.

Examination

By Mr. Beizer:

Q. I have questions, sorry, you'll have to bear with me. I'll try to move this as rapidly as I can. Mr. Saden, to go back, and we are going to in part cover some of the material that's already been covered perhaps in a slightly different light. In terms of your giving directions to Mr. Collins and Mr. Orcutt what decision was made first in terms of how you were going to redistrict for the Senate? I am referring now to the various considerations, the population, the shape of the districts, and so forth? A. Well, I told them the Senate was going to be 36 seat and that required a population as I recall it of something like eighty-four thousand two hundred and twenty-eight, somewhere close to that figure per seat. Does that answer your question?

Q. Yes, it does. And for the house was the first decision made as to the number of seats? A. Well, we had to decide on the number of seats or I had to make that decision in order to draw what I considered a plan that I was going to recommend and the figure of a hundred and fifty-one seats was one that had been broadly considered as I got the reports during last [77] spring by both sides as a reasonably reasonable number, so because it struck me as being one of that nature because it reduced the existing House from a hundred seventy-seven to a hundred fifty-one which knocked off twenty-six, and at the same time it didn't go all the way down to the bare minimum of a hundred and twenty-five allowed under the State constitution or required under the State constitution.

Q. And after you had arrived at a preliminary plan to submit to Mr. Thim and to Mr. Parskey did you at any time reconsider the size of the House in terms of number of seats? A. No, not after I reached a determination in my own mind that a hundred fifty-one was a reasonable figure. I didn't go into considering every conceivable number that you could pick. It would be a prodigious undertaking to try to do it without staff and you want to remember that I had two part time volunteers and myself and one other man who was doing some of the mathematical checking.

Q. In light of the fact that there was a fair degree of segmenting or the cutting across as well as in light of the fact that there were some shapes which were less than perfectly rectangular did you consider any alteration in the size of the House after viewing [78] the plan? A. We did make a few alterations but they were primarily related to population in an attempt to reduce deviations a little bit more, not of any great consequence but to some extent. I am not assuming that your characterization of the number of segments or in the number of town lines that are broken in the House is unreasonable or beyond the scope of propriety in this situation.

Q. I'll try not to characterize it as either reasonable or unreasonable. I am simply asking whether after viewing the data and the maps you gave any consideration at all to minimizing either the amount of segmenting or the particular shape of the districts by either increasing or decreasing the total number of districts to be formed. A. This was part of the consideration in the formation of the maps themselves. In some instances it had to yield to more important factors.

Q. Were computers used at all in the processing of this plan? A. No, I made no use of computers.

Q. Simply a mathematical operation carried on by Messrs. Collins and Orcutt? A. Well, under my supervision. I might point out [79] that as I interpret the State constitution if the intention was to use a computer it would be sort of foolish to provide for a board of three men. It

would have been much simpler just to pick a computer and say in the constitution that's the way you're going to do it. I think it was intended to pick a representative of each party who in turn were to pick a third elector and the three of them were to exercise their judgment in trying to put together something in the nature of a fair plan for both houses.

Q. In redistricting the Senate was there any particular starting point to which you gave directions to your aides? A. To what?

Q. Was there a starting point, was there a geographical area in Connecticut where you decided to start by shaping a district of a certain sized population? A. No. It didn't make too much difference where you started. I left that starting point pretty much to the convenience of the two volunteers.

Q. The same thing was true with the House. A. Yes, basically the same thing there. The ultimate result was the important thing. The starting point wasn't that important.

Q. You say that the only basis for you to make a determination as to whether the districts were fair looked [80] at over all in terms of how they might predictably vote in a given election were the election statistics for three years, '66, '68 and '70? A. Yes. Those are the only three years that I used and for which I had any statistics that were reasonably manageable in checking it against this plan. You see, you go back to beyond, you go back, too far back, you're out of modern times practically so that you go back to recent history, not ancient history.

Q. And did you in fact plug in the election results for all three years, '66, '68 and '70 into each and every newly created Senate district and House district? A. I did as far as you could. You want to remember that I used that as a check, but you want to remember that where you had a split town you couldn't get accurate election results because they wouldn't—I didn't have the votes of the split sections. There wasn't a breakdown within the town of those split areas because the areas you want to remember are all

census areas, they are not voting areas within the town. If you had the whole town you'd have no problem but once you split a town you just had to arbitrarily take a percentage of the plurality and assign it to one town or the other depending upon the amount of population that was going into a given district, if you follow me.

[81] Q. I do. Could you explain with more particularity the particular voting statistics that you used for 1966, '68 and '70? A. Well, I thought I made that pretty clear. I used the Senate line and the House line, the actual vote in the State of Connecticut.

Q. Vote for the candidates for the Senate and the House in the State of Connecticut? A. Yes, yes. I don't think that—it seemed to me that using the Senate line in trying to check out the Senate plan and the House line in checking out the House line was the fairest way to do it. Taking the governor's line against the General Assembly you get a different kind of result, probably.

Q. What directions if any or what instructions if any did you give to Mr. Collins or Mr. Orcutt insofar as adding a segment of another town to a district in which the predominance of the population was found—let me be more specific. In taking the Senatorial district of which West Hartford comprises the predominant part what directions if any did you give to Mr. Collins or to Mr. Orcutt as to what portions of what other towns to add? A. Well, within the framework of the over-all instructions we wanted to try to keep to a reasonable minimum the cutting of town lines in the House and the [82] segmentation within reasonable limits. Now that doesn't exclude segmentation and it doesn't exclude cutting town lines and I think that the over-all ultimate result that we got was a reasonable one.

Q. In deciding to add a portion of another town or a segmen of another town did you in each case look to the election results for those contiguous towns to determine which segment you were going to add? A. I gave consideration to that factor as a factor in testing the whole area and in

trying to reach an overall fair plan. I mean, you can't just take these things piecemeal and say, "Well, forget everything else and just take this one little district here and is that a good fair district the way it is drawn?" This is the essence, I think, of the line of questioning that I have been getting from Mr. Satter. I don't think that that really hits the objective that at least I had in trying to formulate the plan.

Q. Now during the period beginning when you first became interested in and started working on the redistricting plan up until I believe it was September 30th when that plan was signed and submitted did you contact various persons other than Mr. Collins and Mr. Orcutt and solicit their advice or their opinion relative to the districts that you were forming? [83] A. No, I didn't. I talked to, as I indicated to you, I talked to Mr. Gaffney on several occasions but not with specific reference to any particular problem that was connected with the plan.

Q. Quite aside from any problem with the plan did you directly or indirectly through an agent of yours obtain the advice or the opinion of any political officeholders in any of the towns or in any of the districts that you were in, any of the districts of the State of Connecticut that were being reapportioned? A. Did I obtain their opinion and advice?

Q. Directly or indirectly. A. No, I didn't. I wasn't looking for their advice. I did talk to some members of both parties, I have already described that, but I wasn't looking for any advice from them. I didn't seclude myself or segregate myself from anybody just because I was working on this plan but I didn't seek anybody's advice in the sense that you're asking the question.

Q. Let me be very specific. Did Mr. Odegard from Manchester make any suggestions or give you any communications as to the plan insofar as it affected Manchester? A. No, he didn't give me any advice as to Manchester or any other town in the district.

[84] Q. Or did he communicate with you directly or indirectly? A. No, not that I recall. I never—I talked to him

long after the plan was already in, after September 30th. I have talked to him a few times since then but he didn't sit down and formulate that plan with me nor did he to my knowledge formulate it with Collins either.

Q. Did he give any input whatsoever? A. Not to me.

Q. To anyone that you— A. Not to Collins either as far as I know.

Q. What about Mr. Rome from Bloomfield? A. No, Mr. Rome had nothing to do with it, the drafting of his district.

Q. Mr. Eddy for Newington? A. No, Mr. Eddy as a matter of fact was I think rather unhappy about the fact that this whole plan was being redrawn.

Q. Lucy Hammer from Branford? A. No.

Q. John Zajac from Meriden? A. Your question would be better directed to the so-called agreed plan that attempted to retain all the Senatorial incumbents but the plan would never—that was the one that both sides were supposed to have agreed upon [85] last spring. Now in that case every incumbent was supposedly taken care of by the plan. Actually it wasn't true because it was quite obvious the plan was heavily weighted in favor of the democrats but what they were trying to accomplish is the type of thing that you are asking about now.

Q. What you are really saying, Mr. Saden, is that there was a predecessor to the plan, which predecessor had the inputs of the various senators in those specific districts that were being affected? A. I would say that's a fair characterization of it. It had the input of a lot of senators if not all of them but it had nothing to do with the plan that I suggested.

Q. And in fact didn't you use portions of that plan in formulating your plan? A. No, I don't think so. I started from scratch. That plan was completely unfair in my opinion.

Q. Did you consider portions of that plan for inclusion in your plan? A. I don't know whether there is any coincidence or districts or not but I'll tell you frankly it was not considered as far as I was concerned. If the districts came

out the same or somewhat similar to that plan it's purely by coincidence, not by design.

Q. Was one of your instructions to Mr. Collins to totally disregard that prior plan? [86] A. Yes. We started from scratch on our Senate plan.

Q. And I need not go down the list of Senators, either democratic or republican to ask the same question. In each case the answer would be no, that there was no advice either solicited nor in fact voluntarily given by any of these incumbents? A. Well, I told you I talked to several men who did talk to me about the plan and about their own specific situation on both sides of the political fence, not very many of them. I can't recall, I mentioned a couple of names. I don't remember any others but as far as getting their advice or being influenced to do exactly what they might have wanted to have done that is not so.

Q. I believe you mentioned specifically Gaffney and Carazello. A. Gaffney had no input at all on his own seat. He is in the House of Representatives as you know and he had no input at all on his own seat. As a matter of fact if I recall correctly I think he would probably—his district would probably lose, he would probably lose that district if he ran again in it.

Q. Are you then telling me that with the exception of perhaps Mr. Carazello there was no input directly or indirectly by any of the incumbents into the plan that you drew? [87] A. You're using the word input, Mr. Beizer. If you mean somebody came to me and said, "This is the way you're going to have to draw this plan," the answer to the question is no.

Q. No. Again let me— A. That's the connotation I get from it and I want to make it clear no one was telling me how to make that plan.

Q. I understand that. All I'm asking, all I'm asking is whether there were suggestions made? A. And that included Mr. Gaffney.

Q. All I'm asking is whether there were suggestions made which suggestions you might have totally disregarded or not

disregarded at all as the case may be. Were there discussions made by persons who were incumbents in the Senate? A. I can't think offhand. I can't recall offhand in the Senate that anybody spoke to me about it.

Q. So, for example—well, let me withdraw that. To turn to the House were there suggestions made by incumbents in the House that you received directly or indirectly? A. I had some discussions I told you with a couple of the people that I mentioned. I don't remember the names. There were a lot of people that probably talked [88] to me over this period of time. I made no particular note of it or paid any attention to it. I wasn't taking a recording of everything that was going on in this three month period.

Q. Were you aware of the fact that these suggestions were in any way communicated to Mr. Collins or Mr. Orcutt? A. No, I wasn't aware of the fact that they were getting any greater input, to use your misused word, than I was getting. I'm sure that he talked to others.

Q. But you yourself did not? A. I have already answered the question as well as I can, Mr. Beizer. I talked to a number of people on this. No one was telling me exactly what they wanted to do or how they wanted to have it done.

Q. Would the same answer hold true, Mr. Saden, as far as republican town chairmen that there were no discussions made to you by republican town chairmen as to how districts might be created either in the Senate or in the House? A. No, that's not true. Town chairman in my own town tried to tell me how to draw the districts and I completely ignored him.

Q. Was he the only one? A. He is the only one who contacted me.

Q. Were there others to your knowledge who contacted [89] Mr. Collins and Mr. Orcutt? A. Not to my knowledge.

Q. What about republican state representatives, state party leadership, were there persons connected with republican state party leadership who contacted you directly or

indirectly and gave suggestions how districts might be formed? A. No one contacted me other than the few that I have mentioned that I recall. It might be I talked to somebody else but there is nothing of any significance that impressed itself on my mind.

Q. Well, don't misunderstand me. I'm not asking whether you necessarily responded affirmatively to the suggestion they made, I'm simply asking whether there was an offer on their part to you either orally or written concerning the formation of their districts? A. I have no doubt that there were several people who talked to me and had all kinds of ideas and were wondering what was happening but if you want me to give you a detailed minute description of every word that everybody said to me I just can't do it.

Q. Were there any written communications? A. I had one written communication from the town chairman in my own town which I completely ignored.

Q. Did you retain that? [90] A. I don't know whether I have it left now or not. I can try to find it if I have it. I don't remember whether I do or not.

Q. Did you contact or speak about the plan with any political scientist, statistician, computer programmer or other technically qualified person at the Connecticut Public Expenditure Council relative to the formation of this plan? A. No.

Q. Did you contact or speak to any such person at Trinity? A. No.

Q. Yale? A. No.

Q. University of Hartford? A. No.

Q. University of Connecticut? A. No.

Q. Any other institutions of higher learning in the State or in the county? A. No.

Q. To your knowledge did any person on your staff contact any of these persons? A. I had no staff. I had two volunteers part time.

Q. Excuse me. Referring then to Mr. Collins and [91] Mr. Orcutt do you know whether they contacted any of these

persons? A. I don't know what they did. In fact I don't think they did.

Q. Did you contact or speak about the plan with any person who claimed to represent or who were in fact known to represent unaffiliated or independent voters? A. No.

Q. Did you in any way attempt to assess the impact of the plan at any stage of the development on the unaffiliated voters of the State either taken district by district or the whole plan? A. Well, insofar as you give some consideration to the election results you're taking into consideration the impact of unaffiliated voters because they vote in the elections even though they may not be registered with any party so to that extent they were given some consideration.

Q. Were you able to predict what effect the plan would have on the strength of their vote on the meaningfullness of their vote? A. No, not any more than you can.

Q. Did you have access either directly or indirectly to party registrations or lists for any town or district? A. I didn't particularly pay any attention to the [92] registrations of parties in any given district. I did look at election results as I have explained to you already.

Q. You answered that you didn't pay attention. I merely asked did you have access to them? A. I suppose if I wanted to get them I could. I didn't have all the data on registrations in front of me. The answer to that is very simply anybody could have access to them. They are public records.

Q. I have just a few more. I wonder if you could give me some order of magnitude of the number of meetings that you had with Mr. Thim in devising the Senate or House plan. You were a little vague in response to one of Mr. Satter's questions. A. I didn't count them. We started late in August and we went right through September. We didn't meet every day and I just can't give you an exact number on them. Maybe six, eight, ten, I don't know, something like that, in that range.

Q. Now in a number of responses to questions of Mr. Satter you indicated that one of the considerations which you used throughout was whether the lines you drew created a fair plan. As I understand your testimony a test of fairness of plan was a comparison with the election results for three different years, is that correct? A. That wasn't the primary test.

[93] Q. Exactly, but it was consideration? A. It was a consideration, yes.

Q. Now would you spell out a little clearer for me what questions you asked when you compared the districts you created and used the election results to determine whether they were fair. What were the criteria? A. Well, the criteria are if you take the election results for the last three elections for the General Assembly and try to key them into the board plan districts and try to make an estimate of whether a given district would have gone under that plan, would have gone republican or democratic based on those election results. There are uncertainties in that and these were purely a matter of opinion and estimate because there is no way in which you positively can say this plan is going to be democratic no matter if the republicans win the State by a hundred thousand there is no way of doing that and I have already explained to you the problem with reference to splitting towns that we had to arbitrarily assign a certain percentage of pluralities for that town in accordance with the percentage of population that went into a given district, so this was the criteria that I used. I didn't know of any other better way of trying to make a fair evaluation of the election results in terms of the board plan.

[94] Q. It is fair to say, isn't it, that you made an assumption that the election results of '66, '68 and '70 were in and of themselves a fair measure of the fairness of the new districts when you were looking at that characteristic alone? A. They were the best available data that anybody could use to make that determination. If you can point to any other data that one would use under the circumstances I would like to know it.

Q. Were you not assuming when you used those three years' election results that the prior districts, the districts that existed as of the time you were redistricting were in themselves a fair base point? A. What's that?

Q. Were you making as an assumption the fact that the districts that existed as of the time that you were redistricting— A. The old districts you mean?

Q. The old districts were a fair base from which to start measuring the results on the basis of the new districts? A. I didn't use the old districts at all and I didn't think the old districts were fair at all. I think that they were extremely unfair the way they were shaped and I didn't use them because what I have tried [95] to explain to you, Mr. Beizer, is that I tried to take the board plan districts and corollate them into voting results for the '66, '68 and '70 election as best I could, make the arbitrary allocation and split the town that I described to you.

Q. You did have some assumptions what would be fair? A. So that the old districts—it didn't make any difference what the old districts were, it was how the house votes would come out on the new plan.

Q. Is it fair to say in terms of looking at the overall plan insofar as fairness is concerned that there are two competing principles, one principle the principle that you expounded and that you followed, namely testing the results against old statistics? A. Against that?

Q. Against election statistics to see how the House and Senate would break down and adjusting the various districts to achieve some sort of balance, that being one alternative, and another alternative which you did not like to be characterized by, let the chips fall where they may in terms of carving up the State into districts, is that a fair characterization that there are— A. Well, I'm not sure I understand your question [96] but are you trying to say that, why not let a computer do it and forget everything else? Is that what you are talking about?

Q. No, I'm asking what alternative to one of the basic premises that you used was the premise we'll proportion the State based upon population, based upon contiguity, and based upon size and you will let the chips fall where they may in terms of whether that district turns out to be a predominately republican or predominately democratic or mixed district. A. I think that alternative is an extremely unfair one. I'm sure you could do it that way if you wanted to but as I tried to point out before that if you concede as you must the one man, one vote principle is one to create an equal protection of the law is a just result for every man's vote it seems to me that a corollary to that as I explained to you before is the proposition that if you don't get some kind—if you don't make any effort to get some kind of equal representation in the General Assembly in both Houses based upon the kind of total vote you are getting for those Houses you are thereby to that extent depriving the efficacy of that one man, one vote principle because you're denying minority groups as full a voice as they would otherwise be entitled to.

Q. One final question, if you were to carry your [97] principle to the extreme, that of making every district as much a swinging district as possible would you not have followed a very different system and come out with a very different map? A. If you want to discuss political philosophy that has no particular bearing on this case I suppose we could do that all night but I don't know that that question is particularly relevant to the issue here, is it?

Q. Well, I happen to feel it is. A. All right. State it again and I will try to answer it if I can.

Q. If you wanted to give maximum efficacy to the principal of creating some sort of balance in the House and the Senate based upon the '66, '68 and '70 election statistics wouldn't you have proceeded in a different way and arrived at a very different plan from the plan that in effect you arrived at? A. I wasn't trying to give that a maximum efficacy over and above everything else. I am trying to, as

I have tried to explain to you, there were other factors involved and this was just one of them and I think to the extent that you could give some consideration to it that it was deserving of consideration as a secondary or tertiary corollary of the basic principal of one man, one vote.

[98] Q. Finally, one last question, you indicated there were a list of six persons who were suggested by Mr. Parskey as persons who might be that third person to formulate the plan. Could you give us the names of those six persons and if possible their political affiliations? A. Yes, I think I remember most of them. I'm not—there were, let me see, there was Judge FitzGerald who had been a democrat, Justice Cotter,—There was another judge who was a democrat, I can't remember his name offhand.

Q. Justice Borden? A. Borden? It does not strike me but Mr. Satter says Judge Borden. It may very well be but there were three republicans, Justice Thim, Justice King and Judge MacDonald. That's my recollection on it.

Q. But you do recall that the sixth judge so to speak whose name you are not sure of was a democrat? A. Yes, there were three democrats and three republicans. I might add that it was upon Mr. Parskey's insistence that the third man be a judge and not just a legislator as the constitution permitted. I had no preference for that necessarily but I went along with Mr. Parskey's suggestion. As a matter of fact I suggested a different procedure.

Q. Did you make a counter proposal to Mr. Parskey?

[99] A. I had suggested to Mr. Parskey that he and I try to work out some kind of an agreement and after having worked out an agreement if we could select a third legislator at that point to go along with the plan but he rejected that.

Q. Was that in writing? A. No, that wasn't in writing.

Mr. Beizer: I have nothing further.

Mr. Satter: I have nothing further.

(Whereupon, the deponent was excused, and the taking of the deposition was concluded at 5:54 o'clock PM)

Deposition of James F. Collins

[4] **James F. Collins,**

Having duly been sworn by the Notary Public, testified as follows:

Examination

By Mr. Satter:

Q. Why don't you give the stenographer your full name? A. James F. Collins, office address 799 Main Street, Hartford, Connecticut.

Q. And, Mr. Collins, are you an attorney? A. I am.

Q. With offices in Hartford? A. Yes.

Q. And in the 1971 session of the Legislature were you employed as one of the counsel to the Republican party? A. I was.

Q. And specifically assigned to the area of reapportionment? A. I was.

Q. Did you continue as a counsel to the Republican party with the specific responsibility of reapportionment through the session of 1971? A. I did.

Q. And after the session terminated in June of 1971 did you also continue as counsel to the special eight-man commission appointed pursuant to the State Constitution to [5] deal with reapportionment through the month of June up until June 30th? A. I did. I was.

Q. Up until July 1st, 1971? A. (Witness nods his head yes.)

Q. After the three man board to deal with reapportionment was appointed pursuant to the State Constitution did you continue as counsel to that board? A. I don't know if my term would be counsel but I was an advisor to the board, yes.

Q. Specifically did you work with what member of the board? A. Primarily Judge Saden.

Q. Did you work with other members of the board as well? A. Briefly at the very end, Judge Thim.

Q. Did you do any work for Judge Parskey? A. No, I did not.

Q. In your working for Judge Saden were you his principal advisor of both the Senate and House plans? A. I would say I was, yes.

Q. Who else worked with you for Judge Saden? A. A Representative, Robert Orcutt, worked with Judge Saden and myself on the House and we had a young assistant named Rand, June Rand, who primarily did statistical work on both the House and the Senate. The last four days or five [6] days or so, in fact I would say the last couple of weeks we had some help from Tom Vocelli and Karen Weiss. We were also assisted by stenographers, I'd say roughly, typists, perhaps eight of them, seven or eight of them.

Q. Now in the preparation specifically of the Senate plan did you rely upon a previous Senate plan which had been the subject of considerable work by the eight man commission or did you start afresh? A. You're talking about what time now?

Q. Excuse me. After July 1st, 1971. A. Well, at that time I had the commission files in front of me, including the plans that had been presented to the commission or drawn by the commission—there were more than one, as I recall—and based on them and based on my own knowledge of the State, I think, I drew at least six more plans on the Senate, perhaps more. I can't remember exactly because some of them were thrown out without much debate, but I would say at least four or five full plans.

Q. And were the plans which were presented by Mr. Saden and which were the subject of negotiation between Mr. Saden and Mr. Parskey plans which were based upon the commission plans worked out prior to July 1, 1971? A. To some extent. It all depends on your definition of what is worked out. There were some areas of agreement. There

were some relative Senate Districts which were changed [7] very little, a simple illustration being the First and Second which I don't believe were changed at all on any plans, and there were others. The variations after that were considerable, I would say.

Q. Do you know how Judge Saden and Judge Parskey worked in developing the plan for the Senate? A. Other than through whatever Judge Saden told me I didn't know anything for the simple reason that I was not present at any of the meetings between the two Judges or, for that matter, with the third Judge. There were several, that I know because I would go over the coming meetings with Judge Saden before he would go to them, and go over the discussions after the meeting was over, but I did not attend any of the meetings.

Q. In the development of the Senate plan during this period from July 1st with whom did you consult? A. Judge Saden.

Q. Other than Judge Saden what other people did you consult with? A. On the whole no one—in drafting the plans, you're talking about?

Q. Yes, drafting. A. No one.

Q. Did you actually draft the plans and then submit them to Judge Saden? Is that the way it worked? [8] A. Yes. Well, Judge Saden explained to me what he was looking for, what he wanted, and then asked me to go ahead and draw plans on that basis, which I did.

Q. So you actually did the drafting? A. I did. Mm-hm.

Q. By drafting I mean you drew the lines? A. I did more than that. I drew the cuts, too.

Q. What do mean by the cuts? A. Well, in the sense that in drafting a plan based on a thirty-six seat Senate it was necessary to cut towns in order to arrive at plans which were constitutionally, at least what we felt were constitutionally valid.

Q. And in the drafting of the Senate plan did you consult with party leadership? A. No, I did not. You're talking about July onward, I assume?

Q. Yes. A. No, I don't recall ever discussing it with party leadership other than Judge Saden.

Q. Did you specifically talk, discuss your drafting of the plans with, and I'm talking about the Senate, with your Republican party chairman, Mr. Gaffney? A. No, I did not. I should qualify that by saying that obviously I had consulted with Gaffney during the Legislative session on Senate plans, but after the three judge panel was [9] in existence I don't recall ever sitting down and discussing the matter with Gaffney, no.

Q. Did you discuss the projected Senate plans with the Republican Senators? A. Possibly one or two of them, three of them, very vague in my mind for the simple reason that I really and truly didn't pay much attention to either the Senators or the Republican State Central Committeemen and women. It had been agreed upon pretty early in the game that those considerations shouldn't enter into the planning. Several Senators, I believe, talked to me about—I say several—some Democrats too, for that matter, who talked to me about their specific districts, but it didn't affect it one way or the other either way.

Q. What Republican Senators did you talk to as to their districts? A. Well, to the best of my memory I think Roger Eddy, who had been one of the commissioners on the eight man commission, asked me what was contemplated on his particular district and I discussed with him the three or four variations on his district that were being discussed. I think Senator Rome asked me the same thing. I think Senator Power might have spoken to me once about it. Senator Dowd spoke to me about it on three or four occasions. Senator DeNardis might have spoken to me about it once or twice. There may have been one or two others. [10] Those are the ones I can remember for sure.

Q. What Democratic Senators spoke to you? A. Senator Lieberman for one. I can't remember whether Senator Sullivan spoke to me. I guess it was after the plan, the same day the plan was submitted. I talked to one or two others

very briefly. I would hardly say I discussed the plan with them, just in general.

Q. With respect to the House plan did you speak to the House Republican leadership? A. No. I don't recall doing so once we started actually drafting the plan in July. I had discussed the plan in general and for that matter in specifics with the House leadership back in the time of the session and when the commission was in existence, and by House leadership primarily I'm referring to Representative Lenge and Representative Orcutt who were on the commission, and to a very small extent with Representative Collins, and a larger extent with Representative Gaffney, but once the commission died by law, once the panel was impaneled the only member of the House that I really spent any time with was Representative Orcutt because he and I were drafting the plan more or less together. As I recall I drew the basic outline of the plan and he and I worked on the detail.

Q. Did you discuss the House plan with any of the Republican Party leadership other than the House leadership you have just referred to? [11] A. To the best of my memory after the three judge panel came into existence no, not really. If I did discuss it with any of them it was in passing and without going into any detail at all. I didn't go into detail I don't recall with any of them on their specific House seat. No. Again, there might have been brief discussions with—I say brief, they would ask me how's it coming and I would say, and even there it was somewhat limited, I would say not more than a half dozen at the most, even to that extent.

Q. Did you discuss the House plan with any of the Republican legislators? A. No. It was pretty much the same as it was in the Senate. The discussions had all been during the session. Once the three judge panel was in existence the Republican leadership, outside of a general comment about how's it going, something like that, never went into any detail at all.

Q. I'm talking about individual Republican legislators. A. Again I will say what I said. I might have talked briefly with a half dozen of them or so but never in specific detail, no. I think perhaps Bob Orcutt might have discussed the details with some of them, more so than I, at any rate.

Q. Which House Republican legislators did you discuss the House plan with after July 1st? A. Well, I have a recollection of one of the Republican House members from Cheshire, I can't remember his name, but I [12] remember discussing it with him since he was interested as to whether or not Cheshire would remain as a unit or whether it would be cut. I remember that conversation, and at that time I couldn't tell him because I didn't know.

I remember another man from Enfield, again I can't remember his name, and he merely wanted to know whether his district was going to remain totally within Enfield or whether it would involve some other town, and again it hadn't been decided when I talked to him and I couldn't give him the answer. There may have been one or two others but I did not pay a great deal of attention to the Republican legislators.

Q. How about Democratic legislators? A. On the House? I don't recall talking to any of them at all except very much in passing, just in the corridor, just passing the time of day, that's about all.

Q. With respect to both the Senate and the House plans what data did you use in the preparation of each of these plans? A. Well, the preliminary data—I say the preliminary, the preliminary criteria that Judge Saden had set up and the preliminary data actually was the U.S. Census data for 1970.

Q. What other data did you use? A. We also used or I also used election data and House election results for the elections of 1966, '68 and '70.

Q. Did you use reporter registration? A. No, never, either the House or the Senate at any time.

[13] Q. Did you in the development of these plans use a computer? A. The party, Republican party, had con-

tracted for a computer while the legislature was in session, and both Bob Orcutt and myself worked with the man who was the head of the outfit in the attempt to develop plans for perhaps four months but it turned out to be four months wasted.

Q. Did the Republican party hire a programmer for this computer? A. We did. We hired a computer outfit, yes, but unfortunately the money went down the drain in the sense we never got—to be perfectly honest about it the party never even got a Congressional plan out of it. It just never worked, that's all.

Q. What was the name of this computer outfit? A. I don't remember the name of the outfit. The man's name that I guess owned it was Leyland, George Leyland.

Q. Where was he located? A. Cambridge, Massachusetts, I believe.

Q. Did the programming for that computer include both the census data and the election results that you have referred to? A. I don't believe—I'm not sure of the answer to that. I don't believe he got into the election results. I believe [14] he attempted to but he was having so much difficulty with his population data that we never even got around to the election results even if he did put it into the program. His attempts to draw Congressional plans or House and Senate plans purely based on census data were disastrous. It just was impossible. The plan didn't work at all—the program didn't work at all and it gave us absolutely no help whatsoever, and I believe the party finally terminated the contract around May.

Q. Do you know how much was paid to that computer outfit? A. No. I wasn't in on the negotiations. I don't have any idea what was paid.

Q. Do you know whether there were negotiations and discussions between Mr. Parskey and Mr. Saden respecting the Senate plans? A. Judge Saden told me that there were. As I say, I wasn't present at any of the meetings and therefore I assumed that this was true. And as I recall on

at least two or three occasions Judge Saden had maps with suggested Senate plans that Judge Parskey had given him that he and I discussed so I assume there were discussions.

Q. Do you know over what period of time those discussions relating to the Senate plan went on? A. From the time of their first meeting until the final day which was the Friday before the 30th of September.

[15] Q. I think we agreed that date was September 24th. A. Well, from the day of their first meeting up until September 24th discussions went on.

Q. And do you remember when they first met? A. If I recall, Judge Parskey had a vacation, I think he went to California in August, and I believe he came back around the 20th or 25th, somewhere around in there, and I think the first meeting was shortly thereafter.

Q. So they really started to work on this plan then from approximately August 25th or so until September 30th? A. Yes.

Q. Just had a little over a month to do this job? A. That's right. They had—I should say that Judge Parskey and Judge Saden had had some preliminary meetings, I don't know how long or how many, back in the discussion or who the third person was going to be. How much discussion they had other than merely who the third man was going to be I couldn't say. I don't know.

Q. From your knowledge the real discussions relating to the substance of the Senate plan was approximately from the period of August 25th to September 30th? A. To my knowledge this is so, yes.

Q. And how about the House plan? A. Again I can't say other than what Judge Saden told me. It's my understanding that they never discussed the House [16] plan, primarily because from what Judge Saden told me that Judge Parskey never wanted to discuss it.

Q. Were you given any alternative House plans from Judge Parskey? A. One, as I recall. One map, one small twelve by fourteen inch map which had lines drawn on it, a

rather—it looked to me like a rather hastily drawn map and it did not go into any detail in the sense all it did was group areas, didn't have any breakdowns in the areas, and it was very, very inadequate. I couldn't really do much with it.

Q. And other than that was there any—were you aware of any discussions or negotiations between Judge Saden and Judge Parskey respecting the House reapportionment? A. None at all.

Q. What were the factors which were used, the basic factors which were considered in the development of the Senate plan? A. Well, the first factor obviously was the population. Judge Saden and I discussed the legal requirements. Both he and I had read most if not all of the cases, Supreme Court cases on the matter, and we agreed that the primary legal requirement if not the sole legal requirement was that the districts had to be as nearly equal as practicable.

Q. Did you have a fixed percentage deviation in mind? A. No, we did not.

[17] Q. What other considerations did you— A. I might say in regard to the deviation I advised Judge Saden that in my opinion as to how close a plan could be drawn based on my personal knowledge of the statistical data that was available to us, so that I gave him some indication as to how large a variance I thought was statistically possible or how small a deviation or deviance was statistically possible.

Q. And what was your advice on it? A. I indicated to him that I did not think that a plan could be drawn that would make the districts maximum to minimum less than maybe six, seven, eight hundred, somewhere around there. In other words, the maximum deviance would be in that area, whether it was up or down.

A simple illustration of that would be the City of New Britain with eightly-three thousand four hundred forty-one people whereas your perfect district would be on a thirty-six Senate eighty-four thousand two hundred twenty-eight, so if you're going to leave New Britain as a single district

you automatically had a built-in deviance right there of almost eight hundred, seven hundred forty, whatever it is.

Q. What percentage of the average would that come to? A. About nine-tenths of a percent, less than one percent.

Q. Did you have in mind any specific percentage deviation that you did not want to go above? [18] A. No, we didn't go—I don't recall any discussion about how far above we would go. The discussions were all how close we could get. And as I say I told him that I thought it would have been difficult to come up with a plan where at least one or two or two or three districts did not exceed, oh, maybe seven hundred, somewhere around there.

Q. Seven hundred people? A. Yes.

Q. And what other factors besides population equality did you consider in the development of the Senate plan? A. I considered the Senate election results for 1966, '68 and '70.

Q. What was your purpose in considering them? A. Judge Saden indicated to me that, number one, he wanted plans which were statistically population-wise as nearly perfect as he could get, and, number two, that he wanted plans which would be in his opinion fair plans, or my opinion fair plans, or our joint opinion, and when I said "What do you mean fair?" he said "I would like plans which in theory at least would do this: whichever party carried the State on, let's say, the Senate level, because we're talking Senate, whichever party carried the State on a Senate level, that is, adding up all the votes received by the Democratic candidates for Senate and all the votes received by the Republican candidates for the Senate, if a party were to carry the State of [19] Connecticut on that level then that party should carry the Senate." And in light of that direction I attempted to draw up plans to conform to what he wanted.

Q. So that you considered both population equality and the, in effect, political result of a plan? A. Right.

Q. In the designing of these districts, is that right? A. In that order, right.

Q. Did you consider incumbencies? A. Well, to some extent in the sense that in drawing a plan I didn't deliberately go out of my way to put four senators in the same district. I considered it to that extent but other than that it wasn't a major consideration, I'll say that much.

Q. And what factors did you consider in developing the House Plan? A. The same exact factors, namely that the first criteria was a plan which was mathematically as close as it could be, each House deviance would be close as possible. Again I advised him that the area of deviation, maximum deviation, would probably run around seven hundred, because of the statistical data available, and secondarily he again said that if possible he would like a plan or plans which would reflect the vote.

Q. Did you consider incumbencies? [20] A. Not to any large extent, no. In fact I couldn't in a great many instances I couldn't tell you what happened to the incumbents. I don't know. It was difficult enough drawing the plan in the first place.

Q. With respect to the House plan did you have in mind any specific percentage deviation which you strove for? A. No. There again percentage didn't enter into it. It was a question of number of people for the simple reason that I knew that approximately eighty percent of the total areas that we had to work with contained more than four hundred people, in fact they contained more than six hundred people, as I remember it. In other words, we were dealing with areas and we had to block areas together.

There are roughly in Connecticut on the census maps about twenty-seven hundred, twenty-eight hundred areas, and the average population in each of those areas is over eleven hundred and eighty percent of them, seventy-nine or eighty percent of them are over six hundred, and about ninety percent of them are over four hundred, so therefore I knew statistically that it would be very, very difficult to draw any plan, I don't care how it was drawn, that would not have a deviance of six or seven hundred in some areas. Couldn't help it.

Q. Did you have any maximum percentage deviation? A. No. Judge Saden—as a matter of fact I did in the sense I kept recommending we could go a little higher in the [21] sense of deviance. I can give specific illustrations; the town of Cheshire has nineteen thousand and fifty-one people and the town of Ansonia has twenty-one thousand one hundred sixty and originally I recommended to Judge Saden, I indicated that that should—perhaps those two towns should not be cut in the sense they were only slightly over the seven hundred figure, but Judge Saden insisted in attempting to arrive at as close a deviance as possible that those two towns be cut, that they were too large, so we cut them.

Q. Did you feel compelled by your interpretations of the equal protection clause of the United States Constitution to keep within any specific percentage deviation in the development of the House plan? A. No. Again, it wasn't a question of percentage, it was a question of population. I was more—in drafting I was attempting to get as low as I could and I knew that I was faced with about a seven hundred population deviance that couldn't be avoided.

Q. But in fact you did get a deviation that was in excess of seven hundred, did you not? A. Some. I think there were seven forty or seven thirty or something like that. The seven hundred wasn't exact, the seven hundred was approximate.

Q. What was the percentage deviation for that? [22] A. I think the largest deviance—I think there is one district that's seven hundred eighty-seven above average, and another one I think is seven hundred and sixty something below average.

Q. What percentage of the average population for each district? A. What's the percentage deviance, you mean?

Q. Yes. A. Three point nine, I think, or three point eight, somewhere around there, because we were dealing with an average district of twenty-thousand eighty-one.

Q. With respect to the illustrations you have given of Ansonia and Cheshire approximately what would have been

the percentage deviation if those towns had remained intact as single district? A. About five percent. Ansonia is twenty-one thousand one sixty as against twenty thousand eighty-one is a difference of what, nine hundred or a thousand, a little over a thousand, thousand sixteen, somewhere around there. That would be five percent.

Q. And Cheshire had a population of what? A. I believe it's nineteen thousand fifty-one. It could be thirty-one. It's one or the other.

Q. Again the difference between nineteen thousand and thirty or fifty-one and twenty thousand eighty-one which is [23] the average would be approximately a thousand? A. A thousand, yes. About five percent.

Q. So it would be about five percent? A. That's right.

Q. Did you feel compelled by the Federal Constitution to keep below five percent in your deviation, by the United States Constitution—I withdraw the question and ask it again. Did you feel compelled by your interpretation of the United States Constitution to keep below five percent deviation in each of the districts? A. Well, how I felt is somewhat irrelevant in the sense I was governed by what Judge Saden wanted, and Judge Saden wanted a plan which as far as he was concerned deviated as little as possible and I did the best I could under the circumstances.

(Short recess.)

By Mr. Satter:

Q. With respect to the reapportionment of the House of Representatives how many districts were formed? A. Hundred and fifty-one.

Q. And of that number—excuse me. Withdraw that. How many town lines were cut in the— A. Final plan?

Q. Yes, in the final plan in the formation of House districts? [24] A. Forty-seven.

Q. In forty-seven districts a portion of a town was added to another town in the forming of— A. Fifty-five, I think, districts contained portions of two towns. There were

forty-seven towns that involved cutting but I think if you count there are fifty-five districts that contained portions of two or more towns.

Q. Was an attempt made to reduce that number of town cuts? A. No, not really, in the sense that the Judge, as I said earlier, Judge Saden insisted on mathematically wants perfections but it's the best we could do and this involved obviously cutting the towns.

Q. So given the two criteria you have mentioned of population equality and a desire to achieve a certain political result— A. A balanced political result I would say would be the way to phrase it, yes.

Q. Given those two criteria no attempts were made to reduce the number of town lines cut? A. No.

Q. Could this same plan having the same number of seats and with the same percentage deviation have been drawn by cutting fewer town lines than in fact were cut? A. I doubt it. I think there might possibly be one or [25] two areas in the state. This is purely a matter of judgment anyway. I would say there might be as many as three areas that conceivably did not have to be cut for political reasons in the sense of balance, but there again it's a matter of judgment as to whether this is necessary or whether it isn't.

Q. No, I didn't ask you that question, Mr. Collins. I have left out the political considerations, left out what you call the balance completely. A. Just mathematically you're talking about?

Q. Yes. I'm saying—let me make my question clear—leave out entirely the consideration of political balance as you have described it and consider only the factors of the size of the House, namely a hundred fifty-one seats, and the percentage deviation of approximately plus or minus four per cent, could fewer town lines have been cut? A. I would say yes, perhaps two, maybe three.

Q. Is that all? A. That's all.

Q. Did you make any attempt to analyze the plan from the point of view of excluding the political balance which

you have described and simply endeavoring to find the fewest number of town lines that could be cut with a hundred and fifty-one seat House and within a deviation of plus or minus four per cent. A. Yes. I would say I went over it to see what would [26] be the minimum number of towns that would have to be cut regardless of any other consideration other than mathematics and I would say it would have been around forty to forty-two in any event; for that deviance you've got to get that high. If you want a higher deviance then you can reduce the number of towns, but as long as your deviance is down around the figures that it was in the final plan then I don't see how you can do much better than cut around forty towns, maybe a little more.

Q. After you had prepared your plan, your House plan, with the deviation which you had, with the number of seats which you had, and with the additional factor of the political balance which you have related, did you make any attempt to revise that plan in order to reduce the number of town cuts? A. My conclusion at the time was and I still think this is true that there could be no revision, not really.

Q. I didn't ask you that. I asked you whether you made any attempt to revise, to reduce the number of town line cuts. A. I discussed with Judge Saden two or three areas where it could be, the cuts could have been eliminated. I can think of two at any rate, possibly three, and we discussed it and I said in my opinion on balance it should not be eliminated.

Q. And what were those two or three areas you referred to? A. One was Killingly; one was Watertown; and another one [27] as I recall was Bloomfield. There might have been one or two others.

Q. And what were the factors that let you not to—led you and Mr. Saden in your discussions not to eliminate those town cuts? A. Because of the fact that we wanted a balance. We wanted a political balance in the sense he wanted a plan which if the Republican party carried the state on the House level that the Republican party would have a chance to carry the House, and if the Democratic

party carried the state on a House level that the Democratic party would carry the House, and in my best judgment in order to do this these were necessary.

Q. Could the number of town lines to be cut have been reduced by increasing the percentage deviation? A. No question about it. The higher the deviation the less the town cut.

Q. Was any attempt made by you to prepare a plan with a deviation higher than approximately plus or minus four per cent in order to reduce town cuts? A. Well, if you're going back to when the legislature was in session I would say that I probably drew as many as forty plans or so. I can't remember how many plans I drew. I drew a great many of them in numbers ranging all the way from the Constitutional limit of a hundred twenty-five to the [28] Constitutional limit of two twenty-five. As far as the board was concerned the only plan we ever drew was for the hundred fifty-one.

Q. And do you have those prior plans that you have just alluded to? A. I would say I have them around somewhere, home or somewhere, yes. By plans I don't mean detailed plans, obviously, because it's way too much work in each individual plan. These were just suggested plans on small maps where you would block off areas and assign so many seats to that area without actually cutting into the towns or cutting into the area. This was done by both sides preliminarily.

Q. And would you be willing to make those plans available to Mr. McCarthy? A. God help him if he wants to look at them but he's certainly welcome to the whole file cabinet full of them. They are pretty messy, a good many of them, because there are a lot of changes and suggested changes, but he's welcome to all of them if he wants them.

Q. Do you have any recollection of how many town lines would have to be cut if, for example, if there was a percentage deviation of five percent? A. In the thirties. I would guess thirty-seven, eight, nine, around there.

Q. And if there were a percentage deviation of six [29] percent? A. It would come down each time. Each percentage would come down two, three or four, as I recall, and there are—around seven and a half percent down I think it got down to maybe thirty, somewhere around there.

Q. In the plan in addition to the number of town lines which were cut there are also segments of towns, there was also a certain number of segments of towns which were added to other towns in the formation of assembly districts. A. Well, yes, there would be cuts from towns, yes.

Q. And the number of segments exceeded the number of towns whose lines, the boundary lines of which were cut in the formation of districts, isn't that correct? A. I can't answer that other than to say there there are fifty-five districts that have pieces of towns in them, two or more towns, or as there are forty-seven town lines that are cut it gets—we could debate—you can get debating what is meant by segment in the first place. If you have two adjoining towns and you cut a piece out of each one of them to make a district are you cutting both towns or are you cutting one? I don't know. We counted it on these figures as cutting both towns. It could be argued that you're only cutting one.

Q. Well, isn't it a fact, Mr. Collins, that there are seventy-eight segments—excuse me—seventy-eight portions [30] of the town which are used in the forming of a district that are not wholly within that town under the board plan? A. I believe that's true in the sense if that is what you alleged in your federal complaint then it's true. I checked it and it's true. I think there's seventy-nine, as a matter of fact.

Q. Now was any attempt made by you to reduce that number of segments after you had—excuse me—in the formulation of the House plan? A. Well, as I have already testified we made no attempt whatsoever to check into segments as such. The criteria were as given. We tried to make the plan mathematically as close as we could and tried to balance it politically and those were the criteria. We didn't count the segments.

Q. Now— A. I will say this. In the cutting we tried to make the cuts at least large enough so that they would not be ridiculous in the sense we weren't cutting a hundred and ten people out of one town and putting it in another town.

Q. Now were you in the development of the House plan where you had a choice between avoiding the cutting of the town and achieving your political balance did the achieving of the political balance dominate over the avoidance of the town cut? A. Well, as far as again in drafting is concerned [31] avoiding the town cut meant—we were cutting, without question we were cutting forty towns so therefore whether we cut forty or forty-one made very little difference.

Q. Is it fair to say that once you recognized that in the development of the plan that you had to make town cuts it then didn't make any difference really how many towns were cut? A. It made this difference, in the sense that we were not going to shatter the town lines in the sense of just making a jigsaw out of the whole thing but at the same time in order to achieve what Judge Saden required I did not—I cut town lines which were in my opinion necessary.

Q. In order to achieve the political balance? A. In order to achieve the balance, yes.

Q. Now, for example, you had mentioned the town of Killingly and I show you what is Plaintiff's Exhibit A introduced as an exhibit, I might say, in Judge Saden's deposition and he has agreed that this is a fairly accurate depicture of Assembly Districts 50, 51 and 52 under the board plan. Would you agree with that? A. Yes, that's accurate.

Q. Would you also agree that it would have been possible to have avoided the cutting of Killingly in the manner illustrated in Plaintiff's Exhibit A-1 which I have here entitled alternative district covering the same Assembly District? [32] A. Yes, except these are misleading. You only have three districts and I can tell you ahead of time that if you don't cut Killingly such as you don't on this one

that you're going to cut another town somewhere down in another area.

Q. Well, may I, Mr. Collins, point out to you that in this Plaintiff's Exhibit A-1 we have used precisely the same areas— A. I realize that.

Q. —of the State. A. I realize that.

Q. Would that change your last answer? If you look at Plaintiff's Exhibit A-1 you observe that it covers precisely the same land area and the same towns as— A. No, because the answer would have to be varied on the basis of what we were drawing these things on. We were talking of drawing them on a political balance basis so that this particular cut here was done on a political balance basis so if you don't do it here you have to do it somewhere else, that's all.

Q. In other words, again, that although it was possible to avoid the town cut for Killingly— A. It very well would have predicated—I'm not saying specifically, but it would have been a cut somewhere else, yes.

Q. In other words, the primary consideration then was— A. In that particular cut.

[33] Q. —in that particular cut was your purpose seeking a political balance? A. Exactly.

Q. Would, for example, your answer be the same with respect to the town of Watertown? And I show you Plaintiff's Exhibit B, again in the Saden deposition, which depicts the board plan indicating a cut in the town of Watertown for Assembly Districts 68 and 69? A. The answer is the same.

Q. The answer is the same? A. Mm-hm.

Q. That the town of Watertown need not have been cut except for the fact that political considerations of balance played a part in the decision to make the cut in the way the board plan did it, is that correct? A. Yes. Again, these are subjective. No way of knowing for certain.

Q. With respect to the town of Montville I show you Plaintiff's Exhibit C, again in the Saden deposition, and I

ask you whether the map showing the town of Montville, Assembly District 37, Assembly District 48 and a portion of Assembly District 45 is an accurate portrayal of the fact that the town of Montville was cut, was divided into three parts in the formation of an Assembly District, is that correct? A. That particular cut was done at the request of [34] Judge Parskey.

Q. But the answer—but my question to you is, was under the board plan the town of Montville as shown by Plaintiff's Exhibit C cut in effect into three segments in the formation of Assembly Districts 37, 48 and 45? A. Yes. It was done, as I say, at the request of Judge Parskey.

Q. And could the town of Montville, for example, have not been cut by forming those Districts 48 and 37 as demonstrated by Plaintiff's Exhibit C? A. I think you will find if you look at your exhibit it's already cut.

Q. Yes, it is cut. A small portion of it is in 45. A. Yes. The additional cut was not necessary.

Q. The additional cut was not necessary? A. Not particularly, no.

Q. But it was done to achieve some sort of political purpose? A. It was done to guarantee an Assembly District in that particular instance. The other one was done to give a proportionately Republican district so they balanced, but the two judges agreed, as far as I know, on that.

Q. Now did the factor of compactness in the shape of either the Senate or the House Districts play any part in your development of either the Senate or the House plan? [35] A. Well, I would have to say how do you define compactness? I'm a little at a loss to know exactly what that means. The State of Connecticut town lines are rather oddly shaped, as any look at any map of Connecticut will show, so therefore to say whether or not a particular District is compact is beyond me, to say the least.

Q. How about within a town? Did the element of compactness, and by that I mean simply trying to achieve some sort of a rectangular shape, play any part in your creating

Assembly Districts or Senatorial Districts? A. I think I should elucidate on the creation of Assembly Districts. It was so difficult to draw a plan, any plan, for the Assembly that in the drafting of this plan or the preliminary board plan, not the final one but certainly the preliminary one, I utilized the commission files and all the work that had been done by the commission and by both sides, Democrats and Republicans, in drawing the final draft for the board.

As an illustration, the lines for the first eight Districts in the City of Hartford were drawn by the Democratic party draftsman and I adopted them exactly the way they were drawn, never made a single change in them. So who drew them and what his reasons were and why I do not know. I took them exactly as they are right out of the commission files and I know nothing about them. I did not draft them.

[36] Q. That is within the town of Hartford? A. Yes, and this was true in some other areas also.

Q. What other areas? A. Well, I believe there were some minor changes in Waterbury and some minor changes in New Haven, but—in fact I think in New Haven—no, I take that back—I think the New Haven-East Haven Districts came right out of the board plan files; Waterbury I'd say maybe four of the Districts, but again I didn't take into consideration too much in the way of looks for the simple reason that looks are sort of irrelevant in the plan. I don't really think you can draw a plan on the basis of looks. I didn't go at it trying to make an esthetically beautiful plan, let me put it that way.

Q. I show you a map of— A. West Hartford.

Q. Districts 19, 18 and 20 in the town of West Hartford which is Plaintiff's Exhibit E in the Saden deposition. Is this a fairly accurate portrayal of the shape of this District? A. Yes, I would say it was.

Q. Do you believe that the District number 19, for example, is a compact District? A. Well, as I say, I don't have any definition of compactness.

Q. How about Assembly District 20? A. The same. I have no definition on compactness. I [37] couldn't say.

Q. What was the motivating factor in all of the curves and turns in the creation of Assembly Districts 19 and 20? A. Very simple. In West Hartford there is no complicated factor at all. I assume you're putting this other—you want me to look at this other one too? E-1, is it?

Q. Yes. A. It's very simple. The secondary criteria, as I told you, was to draw a plan that was fair for both parties. If you use E-1 here as your plan then in essence you're setting up two Democratic Districts and one Republican in West Hartford. If you use the plan as drawn you're setting up one Republican, one Democratic and one swing District. This is a fairer plan on balance than that one.

Mr. McCarthy: Pointing to Exhibit?

Mr. Satter: Exhibit E.

By the Deponent:

A. Exhibit E is a fairer plan for West Hartford in my opinion than E-1.

Q. Are you saying in effect that all of the curves and twists in the boundary lines of Assembly Districts 19 and 20 were to achieve a political purpose? A. No. The curves and twists are due to the fact that those are census lines. The census lines had to be followed in trying to achieve a political balance. This is the way the [38] result came out.

Q. Well, would you accept the fact that that— A. It's a neater looking plan, E-1, but neatness of plan was not a criteria at any time in the drafting.

Q. Well, does not, however, Plaintiff's Exhibit E-1 illustrate that census data alone was not the cause for all of the turns and twists that appear in the board plan ? A. I never said that it was.

Q. So that the criteria then was not— A. Solely census data? No, it wasn't.

Q. It was the political consideration. A. Absolutely.

Absolutely. I don't think anybody is denying this or should.

Q. In the development of Assembly District 19 did you consult with any Republican legislator? A. Are you talking after the judges were appointed?

Q. Yes. A. No.

Q. How about prior to the judges' appointment? A. I had discussed West Hartford with Mr. Lenge when he was a member of the commission, obviously.

Q. Is Mr. Lenge the representative— A. From the 19th District.

Q. From the 19th District? A. The new 19th District. He lives in the new 19th [39] District, yes.

Q. And was this plan developed in order to maximize his chances of reelection in West Hartford? A. I would say that we attempted to, I attempted to set up a plan along the lines I told you, one Republican, one Democratic, and one independent or one swing District in West Hartford, and I would say Mr. Lenge's District is probably the Republican, Mr. Neiditz' District which was 18 is probably Democratic and the other two that Mr. Clark and the other one, I should say that Mr. Clark and Mr. Burn lives in, 20, is a swing District.

Q. So that political considerations then did go into the formulation of Assembly Districts 18, 19 and 20? A. Absolutely. Absolutely. Throughout the State this was true. That just is one of them.

Q. I show you Plaintiff's Exhibit F, indicating in orange Assembly District 13 and in yellow Assembly District 12 in the town of Manchester. Are these a fair depicture of the shape of these two Districts 13 and 12? A. I believe they are. I did not, however, draw those two Districts.

Q. Who did draw them? A. I believe Mr. Orcutt drew them.

Q. Would you concur that the shape of both those Districts is not very rectangular? [40] No, they are not.

Q. What were the factors that played a part in the shape

of those two Districts? A. There again, not having drawn them I can't say. I would assume that it was a political factor but I don't know.

Q. You're not familiar either way about it? A. I didn't draw the District so I don't know.

Q. Did you draw Senate District 29? A. I believe I did, yes.

Q. And is this, referring to Plaintiff's Exhibit H, again Saden's deposition, a fair depicture of the board Senate plan for Senate Districts 29 and 35? A. Yes, I would say that it's reasonably correct.

Q. And do you observe in the Board Senate plan that Senate District 29 extends up to take a portion of the town of Mansfield? A. Yes, it does.

Q. And what portion of the town of Mansfield is taken? A. Western section of the town.

Q. Is that the portion that is within the town or the township of Storrs? A. Tell you the truth, I don't know.

Q. Does it include the University of Connecticut? A. I believe it does but I can't be positive.

Q. In the creation of Senate District 29 did you have [41] a particular purpose in including the University of Connecticut area within that District? A. Not specifically the University of Connecticut area but the primary purpose in cutting the town was to balance the District.

Q. And by balancing the District do you mean that you sought to get Democratic votes within the Senatorial District 29 which is substantially heavily Democratic anyway in order to take Democratic votes from Senate District 35? A. In order to achieve a balance on the Senate along the lines suggested earlier this was true and it was necessary and is necessary.

Q. And that accounts for the cutting of the town of Mansfield? A. It does.

Q. And for the shape of Senate District 29? A. It does.

Q. Now under your theory what breakdown between the two parties did you anticipate under your Senate plan? A. Roughly speaking I would divide the State into fifteen gen-

erally Democratic District, fifteen generally Republican Districts, and six swing Districts.

Q. And what proportion of Democratic and Republican representatives did you anticipate resulting from your House reapportionment plan? [42] A. Well, I would anticipate, or dividing it again into categories, general categories, out of the hundred fifty-one Districts I would estimate perhaps sixty-five Districts that would go Democratic almost always, and there are roughly, oh, fifty districts perhaps that would go Republican most of the time. The balance of the Districts would swing. Again, it's a matter of judgment. In fact I would say there are over seventy Districts that will go Democratic almost all the time, perhaps as many as seventy-two, and the remaining seventy-nine could go Republican, but in fact I would guess that sixty-five of them would go Republican. The remaining fourteen can go Republican but more likely than not will go Democratic in a general election.

In other words, putting it another way, if Nixon were to lose Connecticut in this fall's election by seventy-five thousand which I think is a fair estimate on this plan the Democrats will carry the house by fifteen to eighteen seats in my opinion. Same would be true in the Senate. If he carries the State by seventy-five thousand—

Mr. Beizer: Loses, you mean.

By the Deponent:

A. Loses, pardon me, by seventy-five thousand I would say the Senate should go Democratic either nineteen-seventeen or twenty-sixteen. Conversely, if he carries it—let's say he carried it for the sake of argument by twenty-five thousand [43] and the party lever remained relatively constant, I would say the Republicans should carry the House by four or five seats and they should carry the Senate nineteen-seventeen or twenty-sixteen. This will vary depending on individual races, obviously.

In West Hartford, for example, we have a strong incumbent, hard to beat him, even if we carry the State. The

same is true, I would say, in Stamford which is another swing area. Same is probably true in Tolland where you have incumbent Democrats who are strong and therefore hard to beat.

Q. In the last week of the board deliberations, that is, after September 24th, were changes made in the House plan? A. Judge Parskey requested a change be made in the Montville-Colchester area and Judge Saden agreed to make it. That's one I can specifically remember.

Q. Were any other changes made? A. That change wasn't made in the last week, come to think of it. I don't recall any changes after the final meeting in Judge Thim's office other than merely technical changes possibly in the sense of getting the description out right because that change had been made by a discussion between Judge Saden and Judge Parskey prior to that meeting. Offhand I don't remember. The last week I was working pretty much on the Senate. We were so busy trying to transpose what basically were population figures to other descriptions that I concen- [44] trated pretty much on the Senate and whatever I did in the House was merely to help Orcutt and Rand and the stenographers to transpose the data from population data to area data and I didn't—if I remember correctly I had very little to do with the House.

I believe in the last day I suggested to Judge Saden that on the shoreline Districts that the typed sheets for; the shoreline Districts be amended to refer to census tracts only on all the shoreline Districts in order to make sure that we picked up any outlying islands, but that was purely a detail.

Q. Were there any changes made in the boundary lines of any of the House Districts in the last week? A. I didn't make any, no.

Q. Do you know whether any changes were made by anybody else? A. I think it's possible that for mathematical purposes in trying to make the thing even closer that there were one or two minor changes, possibly in the Burlington-Bristol District and possibly in the Franklin-Norwich Dis-

trict, but if the changes, if made, were purely statistical, really, and as I say I didn't make them and I'm not exactly sure of that timing as to when they were made.

Q. Who would have made them? A. Bob Orcutt would have made them.

Q. Well, since you're so familiar with the House plan [45] would you have known whether or not any changes were made? A. Well, those changes were made—you're asking me timing. I can't remember the exact timing on the change. Judge Saden was dissatisfied with the Districts in Bristol because I had drawn the original Districts myself in Bristol but he was dissatisfied on the deviance. I think the deviance went up to over eight hundred people, eight hundred and thirty or something like that, eight hundred forty, and he was dissatisfied and he asked if the deviance could be brought down and Mr. Orcutt and I said it could providing we cut another town so he said "I want it done."

And the same thing was true in Norwich. Norwich had five hundred and—or three hundred and some odd people added by the census rather late in the game and it meant that if you combined two Districts within the town limits of Norwich that the two Districts would have a rather large population, the largest two, I think, in the State, and Judge Saden felt that that deviance was too large, particularly where we could reduce it by bringing in another town, so he asked if it could be done and we said it could and he assigned Mr. Orcutt to do it.

Now; the timing on it I can't answer that. I don't remember. The discussions were going on all during this time on this. I have a feeling that it was discussed maybe two weeks before the final—when the actual change was made I [46] couldn't answer that because as I say I didn't do it. Orcutt did it.

Q. When you—you say that you really never got any Democratic counter-proposal to your plan? A. To the House?

Q. To the House plan. A. Just the one map that Judge Saden gave me.

Mr. Wade: Judge Parskey.

By the Deponent:

A. Judge Parskey gave to Judge Saden who gave it to us.

Q. And that was when? Early in the— A. No, about the 10th, somewhere around there, of September. Might have been the 15th.

Q. When did you submit your House plan? A. God, I don't know. You'd have to ask Judge Saden that. I mean Judge Saden had the plan and when he gave it to Judge Thim and Judge Parskey I couldn't swear. I don't know. I would guess it was several days before the 24th but I don't know. It might have been the 18th, somewhere around there.

Q. And when you submitted your House plan essentially there were no changes made in it by Judge Parskey, were there? A. Outside of the Colchester-Montville-East Lyme District. I don't know of any others anyway.

Q. Wasn't that plan one submitted for bargaining purposes with the Democrats which you expected there would be some [47] changes made in order to achieve a fair balance from a political alignment? A. My advice to Judge Saden was that the plan as drawn was the only fair plan that could be drawn politically and that any changes whatsoever that he made, that would be made by Judge Parskey would take the plan out of the fair category and make the plan a Democratic oriented plan.

Q. Did you anticipate there would be some changes or suggestions? A. I assumed that Judge Parskey and Judge Saden would discuss it, yes. To my knowledge they didn't, at least this is what Judge Saden informed me, but obviously I assumed that they would discuss it.

Q. Is it fair to say that you really got all you expected with respect to the plan you submitted? A. Well, the plan

as submitted was accepted by Judge Thim, but if I remember correctly I think this was the only plan on the House that was submitted to Judge Thim. There was no other plan on the House submitted to him so the man in fact didn't have any choice, I suppose.

Q. Were you surprised that there was no negotiations over your proposal on the House reapportionment plan? A. A little, yes. I was a little surprised. I thought that Judge Parskey would come in with a plan on the House, yes, and I was surprised that he did not. Although I was aware of [48] the fact that the Democratic party leadership all through the legislative session had very little interest in the House plan as a whole, that their sole concern was with the Senate plan, and the discussions on the House were for the most part unsatisfactory and the amount of agreement somewhat limited.

The breakdown in fact on the House discussions more or less precluded any really serious discussion with or any plan ever being adopted both in the legislature and by the commission. They never were really close to agreement. Never.

Q. So essentially the plan that was adopted by the House was really your— A. Adopted on the House, you mean, not by the House.

Q. Excuse me. On the House. The board plan adopted respecting the reapportionment of the House was essentially your plan as you developed it? A. This is true. I went to Europe in July, end of July and first part of August, and before I left Judge Saden asked me if I would draw a complete House and Senate plan so that he would have it available to negotiate, discuss with Judge Parskey and I did. I drew a complete House plan, hundred and fifty-one seat plan, and a complete Senate plan, including the actual breadowns, and in the final result the board plan on the House is about ninety-five percent of that plan, and on the Senate about the same, maybe eighty-five percent on the Senate.

[49] The House plan as drawn, however, represents not merely my work. It represents the work of a great many people. It is so difficult to draw a complete House plan that I utilized, as I said earlier, what was already available in the commission files and the actual cutting in the individual towns, and, for that matter, even the overall plan to some extent had all been discussed many times by both the members of the commission and the legislative members of the committee.

Q. Your house plan that you developed was significantly different from the commission plans. A. There was no commission plan on the House. The commissioners were negotiating on a basic House plan involving a hundred fifty-one seats, and they negotiated on the basis that the Republican commissioners would have certain areas that they could cut in block areas and the Democratic commissioners had certain areas, block areas that they could cut in, and I would say that roughly half to two thirds of the State was blocked off and agreed on and the argument, the primary argument was in the remaining areas as to who was going to cut those blocks and how they were going to be cut.

If I remember correctly the last two or three nights that the commission was in existence there were nine areas in the State that they were bargaining on as to who was going to do the cutting in those particular areas, Killingly, for example, being one of them, and they never agreed and so the [50] commission died.

Q. Essentially, then, the board plan was, as finally adopted, basically your plan as you developed it? A. Just as I just got through describing, I developed the plan but in doing so I utilized what was already available, therefore I would say a percentage, how much I don't know of the present plan was drawn by the Democratic party, how much exactly I couldn't say, but it represents a plan—it's so difficult to draw these plans—

Q. But the disputed areas were determined by you? A. Yes. Exactly. With the exception of Colchester, again,

which Judge Parskey wanted to cut in Montville and Judge Saden changed it.

Q. And the resulting plan then was one that you and the Republican party were essentially satisfied with? A. Yes, I would say we were. At least I am. I can't swear for the party.

Q. And you say that in your development of the plan that you did not use party registration as a— A. Never. I couldn't give you the registration in one District on either the Senate or the House in the sense I never looked at the registration figures on legislative plans all the way from January till today.

Q. You did not mention, but let me refresh your recollection. In the development of the plan for Stamford [51] did you consult with Representative James Bingham? A. You're talking now the House or the Senate?

Q. House plan. A. If I remember correctly the House plan in Stamford was drawn by the Republican leadership in Stamford. I didn't draw it.

Q. Did you discuss it with Representative Bingham? A. Very vaguely. I had drawn a plan for Stamford myself because I had to, obviously, in drawing the whole plan, but as I remember it the Republican leadership in Stamford had a plan of their own, and in discussing it with Bingham the only real discussion was the general areas which were not really in dispute in the sense there are areas in Stamford that are solidly Democratic and there are areas which are solidly Republican and there are areas which are pluses and minuses, go either way.

Q. In the development of the House plan for Greenwich did you discuss that with the three Republican representatives from Greenwich? A. I did, yes. This was all done during the legislative session, yes.

Q. And was that—was their suggestions embodied in your ultimate proposal to the board and adopted by the board? A. I believe the plan as adopted by the board is exactly the same plan that the commission had in its files,

yes. I [52] don't think there's a single change. There may be one E.D. or something but I don't remember.

Q. This means it was developed in effect by the Republican leadership of Greenwich? A. Right. This was the agreement, as I say, between the commissioners, the Democratic and Republican commissioners, the Greenwich area was, and for that matter the Stamford area too had been agreed on, coudl be blocked out by the Republican party just like Hartford was blocked out by the Democratic leadership, and New Haven.

Q. Did you discuss Senatorial Districts in New Haven with Senator Lieberman? A. I did. At his request.

Q. Did you make the suggested changes which he requested? A. He asked me if I would change a couple of block groups, as I remember it, and I said I had no authority to do it, that he'd have to check with Judge Saden.

Q. And were the suggested changes which he made in fact adopted into the ultimate Senate board plan or board Senate plan? A. I believe they were. There were others, by the way, changes in Waterbury, two or three changes as a matter of fact, requested by Mr. Vocelli.

Q. What is the population of the town of Bloomfield, if you know, Mr. Collins? A. Eighteen thousand three hundred one, I believe.

[53] Under the plan it was substantially divided approximately in almost half, was it not? Under the board plan? A. No, I believe you're talking about the House. Yes. It isn't divided in the Senate. I believe about six thousand people were combined with Windsor and I believe the other twelve were combined with Avon.

Q. And was this division made in order to achieve that political balance that you're talking about? A. Exactly.

Q. The town of Bloomfield is essentially a Democratic town, is it not? That is, it voted Democratic? A. Yes, I'd call it a Democratic town, barring very exceptional circumstances, yes.

Q. And then the three election results which you used, '66— A. Went Democratic all the time.

Q. —'66, '68, '70, went Democratic? A. Yes.

Q. So that your division of the town of Bloomfield for the House reapportionment plan was to achieve the political balance that you're talking about? A. That's right, because Bloomfield being only eighteen thousand three hundred needed another roughly two thousand people in any event, so it required a cutting in that area somewhere in any event, so in cutting we cut it politically.

[54] Q. In order to eliminate the Democratic representative from Bloomfield? A. No, I wouldn't say eliminate him. He can win. He's in a District by himself and he could win. He's a strong candiate. The thing in my opinion in order to balance the State along the line that we were talking about this cut was necessary, the type of cut or the cut itself was necessary.

Q. But the purpose of it then was to reduce a Democratic —potentially Democratic legislator from the entire town of Bloomfield. A. To a swing District. Well, he still controls the District twelve thousand to eight thousand and he still can get elected again. I couldn't say I'm reducing him. As far as I know he's in a District by himself. He isn't running against anybody, no other incumbent, I don't believe, and he could win again, but there is no question that the cut was made for the reasons given. Not only that cut but a good many other cuts. This was the whole argument on the commission as to who cut these, let's say, fifteen areas, and the argument dragged out for seven months, eight months. I ought to know. I was involved in most of it.

Q. And specifically the cut of the town of Bloomfield which is— A. That's one of several, yes.

Q. But specifically the town of Bloomfield— [55] A. Specifically, yes.

Q. Which is essentially a Democratic town under your figures? A. I would say that it is, yes.

Q. Was cut in the manner it was in the board plan in order to achieve the political purpose that you have des-

cribed of balance? A. Yes, in order to balance the plan, yes.

Mr. Satter: I have no other questions.

Examination

By Mr. Beizer:

Q. I have some questions. Just to recap for the record we talked earlier about the use of a computer expert or a computer firm and that after four months this effort was scrapped. A. That's true.

Q. Could you amplify a little more fully as to the reasons the plan didn't work or the computer effort was scrapped? A. Because we got no results out of it. In other words, the computer organization never gave us anything worthwhile on any level. We primarily at that time were developing or attempting to develop Congressional plans rather than legislature plans because if the computer couldn't work on the legislature plans, it wasn't on the Congressional plans, it wasn't going to work on the legislature plans, and we never [56] even received one Congressional plan from the computer. He never could get his figures to balance. Never.

Q. Insofar as the input or the instructions that you or Mr. Saden or your predecessors made with respect to the computer firm were the same considerations given to the computer firm as governed your mechanical operations, namely, numbers, population statistics and political result? A. Well, Judge Saden for one thing wasn't involved in it. This was long before he was involved in it. Number two, it didn't make much difference what we told Mr. Leyland for the simple reason that his population data in the first place never came out right so we never got into the political data. He had trouble with the population data.

For example, I had one Congressional plan which I had drawn that had a deviation of, say, eight hundred people or so and I gave it to him to feed into his computer to see how it would compare and he came back and told me that my Districts were off by about a hundred thousand. I said

"Well, that's ridiculous. You can tell by looking with a pencil and paper in five minutes that that isn't so." So he said, "Well, show me," so I showed him and he said, "I just don't understand it. I don't understand how this thing can be off a hundred thousand" and that was about as close as he ever came, as I remember it. It was a disaster to say the least, and expensive, I guess.

Q. Addressing ourselves to another area, Mr. Collins, [57] you answered a number of questions of Mr. Satter with respect to the number of towns, town lines that were cut, or number of towns that had the integrity of their geographical borders somehow cut, and you indicated that there were a number that were cut to result in a political result and specifically you talked about three, Killingly, Watertown and Bloomfield. A. Those are the three I can remember. There might have been some others.

Q. These—I was going to ask—these were not the only ones? A. Montville I would say is another one.

Q. Were there others that you just can't recall at this point? A. Well, every cut, every single cut in the plan, both Senate and House, every single cut is a political cut if you get right down to it, you can't avoid it in these type of plans, so that when we are cutting towns as such that to me means nothing. Every single District is politically oriented one way or the other, or at least if it wasn't one or the others it's a swing District. You can't avoid that. I don't care what plan, who draws the plan, this is the way it results.

Q. Let me refocus your attention as the procedure. Is it fair to say that the initial determination to be made in both divisions, a Senate plan and a House plan, was in the case of the Senate to divide the State into thirty-six [58] Districts, and in the case of the House to divide the House in terms of a hundred fifty-one Districts? A. On a population basis that was the first consideration.

Q. And following that determination a plan was devised for both the Senate and for the House, which plan was later

measured or the statement as it was devised was measured against the political result that it would create based on '66, '68 and '70 election statistics? A. There was only one House plan ever developed. There were about five Senate plans, some of them more unfair, if that's the word for it, than others for either side, Democrat or Republican.

Q. But it's fair to say that in the developmental stage of the House towns were cut to achieve some sort of political result? A. Yes. I'd say there is only the one plan, that's right. The same is true in the Senate in the plans they were trying to achieve a balance for towns skewed Democratic or skewed Republican.

Q. Did you give any consideration at any point during your devising of a House plan to revising the number of Districts from a hundred fifty-one either up or down so as to minimize the number of towns that would have to be cut? A. Many times, as I testified earlier, beginning in [59] January I drew plans from a hundred twenty-five all the way to two twenty-five, and I also drew them on variances. I even, as an illustration, I think I drew a House plan on twelve Districts because the Constitution could—you conceivably could interpret the Connecticut Constitution that you could run people at large in twelve Districts. I know the Constitution says you have to have a representative from a District but you could violate that provision by running people at large in large Districts, just like you're violating the town cuts. In other words, don't cut town lines.

A simple illustration would be six Districts. Because I already know because of Congressional Districting that you could have six equal Districts. You could elect, let's say for the sake of illustration, thirty House members from each of six Districts. That would give you a House size of a hundred eighty. It would violate the Connecticut Constitution because they wouldn't represent a single District, but so what? It's still just as constitutional as the present one that violates the cut on the town lines. That way there you don't have to cut town lines. I tried that, too, for your information.

Q. Specifically were you given any instructions by Judge Saden after the time that he was appointed as one of the members of the panel? A. I think I already testified that his instructions [60] were he wanted a plan that was mathematically as exact as we could get it, number one; and he wanted a plan that would be a fair plan in the sense that either party, whichever party carried the State should carry that particular branch.

Q. My question was poorly stated. Did you receive any instructions from Mr. Saden with respect to the size of the House? A. Other than the fact that he discussed it with me and asked me in essence what had been decided by the commission, if anything, and what had been decided by the legislature, if anything, and I went over the history of it with him and told him that there had been an informal poll taken of the House members in which the majority of those voting voted to reduce the size of the House; that the commission, knowing this information, had agreed that they should have an odd-sized House rather than an even-sized House; and that further the commission had agreed that the figure twenty thousand it so happens divides into the State cutting the fewest number of towns on the whole because of the various differences in population, and that therefore it was logical that a House of a hundred fifty-one was probably all things considered, the best size in drafting that involved probably the fewest cuts. If you drew, for example, a House of a hundred fifty-five or a hundred fifty-seven, or if you drew one at a hundred forty-five or a hundred forty-seven, more likely than not you would [61] have more cuts because the twenty thousand figure would then not be the figure, so he said we'll take a hundred fifty-one.

Q. I'd like now to address my questions to the terms that you've been using of achieving political balance, and as I understand your testimony at some point in the devising of both the House and the Senate plans, particularly in the House plan you would add or delete various areas of towns to achieve a desired political result based on the election results of three different years. A. That's true.

Q. Now I would like you to tell me whether the—exactly what you mean by political balance first. A. Well, I'll show you what we were trying to achieve, or what I was trying to achieve. In 1970 on the House level in this State if you add up the total vote of all the Republican House members, received by the Republican House members, or of you add up all the vote received by the Democratic House members you will get a total. The total should either be five thousand, let's say, Democratic or five thousand Republican.

Well, it so happens in this particular year, 1970, there were at least two Democrats that I can remember, Cohen and the girl in Mansfield, that had no opposition. I think there was one in Enfield that had no opposition. I think there were three. So if you look at the record it will show no vote in [62] opposition, and if you don't take into account any vote there at all the Democrats would have won the House by about five thousand, six thousand, somewhere around that area. I don't think this is statistically accurate, and I think you've got to assign a vote total for a Republican or incumbent in those three areas, and the simplest way to do it is to take the average vote received by the Republican candidates in the town and just put it into your figures. If you do that the Republican party on that level carried the State in 1970 by about four or five thousand votes, somewhere in that area.

Now statistically if the total vote is supposed to reflect the population it would mean that the House of Representatives if it's fair should go Republican by one vote. Well, it went, on the plan that we have, it went Democrat by nineteen seats, which means that the present plan is obviously inequitable.

The same is true on the Senate, secondly. If you will go back to the '68 and '66 elections the Democratic Senators carried the State, let's say in '66 by around forty thousand votes but in fact carried the Senate twenty-three to thirteen. Well, Judge Saden felt and I agreed with him that this is inequitable. When a party gets roughly fifty-two to fifty-

three percent of the vote it shouldn't get sixty-four to sixty-five percent of the House. It should get fifty-three percent if it was perfect. Well, this would mean that the Democrats in 1968 should have carried the Senate nineteen to seventeen, [63] or at the most twenty to sixteen. And the same thing is true in 1966. It carried the Senate twenty-four to twelve.

And Judge Saden felt this was inequitable, and I agree with him. I think any reasonable person obviously would agree with him. And therefore the plan, any plan drawn, should have given the Democrats the Senate in 1966 either twenty-to sixteen again or nineteen-seventeen, and the same thing is true in 1970. In 1970 the Republicans carried the Senate by about five or six thousand but in fact lost the Senate ninteen to seventeen. This in inequitable. The Republicans should have carried the Senate in 1970 by nineteen to seventeen or at least it should be eighteen to eighteen.

In drafting these plans on both the House and the Senate I did everything in my power to try to have these plans balance out. I am frank to admit, especially on the Senate, that I drew at least two other plans which were submitted to Judge Thim which were inequitable perhaps from a Democratic point of view in a sense.

A simple illustration: I recommended that the northern part of West Hartford be put into Hartford in the 5th District or in the 2nd District which would guarantee the 5th District Republican. Judge Thim felt this was inequitable and apparently Judge Saden did too. But the plan was submitted, the plan as drawn, the plan as accepted, the board plan, as the fairest of the plans.

[64] Q. To achieve this political balance that you refer to is it fair to say that in some cases the Districts you created went from a questionable swing basis to being clearly Republican and others may have become clearly Democratic? A. In the House I would say that it's difficult to say in the sense that in drawing Districts for the House you run into the situation, for example, in the cities where it's

impossible to draw anything that would give any Republican an opportunity to win. As I said earlier, I think roughly seventy Districts out of the one fifty-one are going to go Democratic even in a landslide by a Republican. On the Republican side there are roughly fifty or sixty Districts that will go—fifty-five, sixty—that will go Republican most of the time. The other Districts will go Democratic a good deal of the time and occasionally in a good Republican year like 1970 will go Republican.

A simple illustration would be Bridgeport. In 1970 we carried five of the ten seats in Bridgeport.

Q. By we you mean— A. We did. The Republicans. Nobody disagreed at any time in all these negotiations, that isn't going to happen again or that that would happen again barring a miracle. The most anybody would concede to say it would. And this bi-election that just occurred here last week in Penuzio's District is a good indication of it. Penuizo's District from your point [65] of view is considered the strongest Republican District in Bridgeport. Yet the Republican lost. So that you have these unusual factors in every election you can't really account for.

Q. Do you recall what the plan did in terms of the House as far as the Rockville area is concernd? A. As I recall it—Vernon, you're talking about, I believe?

Q. Vernon. A. As I recall Vernon is split into two segments of which one goes in with some others in East Windsor, and the other one goes south with Andover and those towns, isn't that right?

Q. Bolton. A. Yes.

Q. You say two segments. There's really three segments in Vernon, are there not? A. I say there are two segments to go out of Vernon and Vernon has a District of its own.

Q. The town now is comprised of three voting Districts or comprises three voting Districts. A. You mean three assembly Districts.

Q. Three Assembly Districts. I'm sorry. A. I was going to say I think Vernon if I remember correctly has four voting Districts.

Q. All right. In any event is it fair to say that the [66] one northern District which is now a portion of Vernon, a portion of East Windsor and a portion or all of Ellington, has been deemed to be a Republican District under the 1970 or '68 or '66 election results? A. In my analysis of the District I would say the District is probably Republican but it could go Democratic. For example, if you look at the '66 figures on the House you will find that East Windsor went Democratic by about a hundred sixty-five votes.

Q. If you took the southern portion and that portion which was annexed to Bolton and Andover that likewise would now comprise a strong Republican District, would it not? A. Well, it depends on what the word strong is. The District should go Republican as a general rule, but all those towns, Marlboro, Hebron, all of them at one time or another with the exception, I believe, of Bolton, have gone Democratic not by much, usually fifty votes or so, but it's possible for a Democrat to win without any question. I would put it swing Republican, both Districts.

Q. In terms of the statistics that you were giving us earlier? A. I would call them swing Republican.

Q. They were counted in the fifty Republicans? A. No, they were not. They were counted in the balance seats. I wouldn't count them as guaranteed Republican seats, no.

[67] Q. They are less swing, they are less swing than the old District which comprised all of Vernon, are they not? A. Vernon I would consider generally a Democratic District and the District that's left in Vernon is still a Democratic District.

Q. Did you either before or after the panel was impaneled, or the board was impaneled to create the plan, did you contract directly or indirectly Senator Olegard from Manchester respecting his views? A. I wouldn't know Senator Olegard if he walked in the room. Never met him, never talked to him, don't know who he is even.

Q. Senator Rome? A. Yes, I know Senator Rome and have known him for a long time.

Q. Did you have communications with him respecting the plan insofar as it affected his District? A. Only other than the fact that it seems to me I bumped into him in the Hall one time, once or twice perhaps, and he was asking me in general what was happening in his area and I said, "I don't know but the Judges will decide, but in any event your District is pretty solid and I don't know what you have to worry about anyway." He was asking me whether Bloomfield would be cut. I said I didn't know, I didn't think so if I had anything to do about it. He asked [68] me what would happen to some of the other town. I said I didn't know what the Judges would decide. The reason for all that is I didn't know, there were so many different plans and different Districts that I had no idea what the Judges would accept.

Q. Did you have comparable communications with Senator Eddy? A. Well, once I remember roughly the same thing. He asked what was going to happen to his area and I said, well, I didn't know specifically.

Q. You mean to say that none of the Senators, Republican or Democratic, gave you any views of theirs concerning what they would find desirable? A. Very little. Very little. Not once. I had very little all along the line. I'm not sure, for example, that the Republican Senators even knew I was doing the drafting, to tell you the truth. For example, I never met Senator Zajac and the plan kills him stone dead. I never met him. I don't even know him. Senator Ives I've met but Senator Ives never spoke to me once and the plan kills him stone dead because it puts both him and Senator Powers in the same District and they are two Republicans and therefore one of them is stone dead. So that I never discussed it with them. Never.

Q. There were some, I assume, the very little that you used before does refer to at least one or two Senators who [69] attempted to persuade you. A. Back when the legislature was in session I remember Senator DeNardis talking to me at some length one time about his area, various

and sundry adjustments and plans, and so forth. Yes, I remember that. I think I spoke to Senator Crafts maybe once for five minutes. Craft, I guess his name is from Ledyard, down that way somewhere. H couldn't care less what I do with the District.

Senator Dowd spent a great deal of time, he was on the commission and he spent a great deal of time talking over his area. I think I spent more time on his area than any other single area, and he did talk to me as I recall briefly after the Judge had been impaneled, asking me what was going to happen, and I told him I didn't know, that it was up to Judge Saden, and there were about four or five different alternative plans in his area.

Q. Senator Gunther? A. Gunther never spoke to me once in the whole business. Senator Finney, I never saw Senator Finney even in the Capitol since last June. Senator Rimer never said a word. Rudolf, I wouldn't know Rudolf if he walked in the door. Macauley spoke to me about Bridgeport back in June, May or June. That's about all. And who were the other Republican Senators?

Q. Lucy Hammer? A. I wouldn't know her if she walked in. I might say [70] I have seen her face around but I wouldn't know for sure.

Q. Peter Cashman? A. Cashman talked to me at the same time DeNardis did, I would say sometime about May, thereabouts.

Q. Let's just stop on Cashman. What, for example, did Cashman tell you? A. Didn't tell me anything. He just asked me what was happening down in his area and did I have any idea what the plan would be, and I told him at that point what the plan was at that point which turned out to be the plan that it finally is, never changed from the beginning to the end. The parties had agreed more or less on that plan in February, on that area, the 20th District, and they never changed from then right until today, still the same. He was satisfied with it and that was the end of that.

Q. Did you have any discussion with Petroni? A. Yes. At the same time, roughly speaking, Romeo came in to see me and I told him what I wanted for the plan and he said, "I love it," and "that's great" and that took care of that. And there were four or five changes in Romeo's area but when it came down to it the plan came out the way I originally drew it.

Q. How about Jack Rudolf? A. Never talked to him once. Don't even know Rudolf.

Q. Did you contact directly or indirectly or speak about [71] your proposal for the plan with any other person known to you to be acting on behalf of a Senator or a Representative? A. No one ever came in to me and said "I represent Joe Smith" or whoever it is and "I want this, I want that." That never happened. I talked to some town chairmen obviously who had come in occasionally wanting to know what's going on in their town.

Q. Any Republican town chairman or Democratic town chairman, for that matter, who made suggestions to you concerning what they would like to see for their area? A. Well, it's possible. It was true, for example, when the legislature was in session, the town chairman of—take the town chairman, he's a Circuit Court Judge now, of Fairfield, talked to me about the Senate District down in the Fairfield area.

Q. Who is that? A. Jacobson? Is that his name? He's a Circuit Court Judge now. I think Jacobson or Davidson, one or the other. He was then Republican town chairman of Fairfield.

Q. Were there others? A. Well, there might have been. I'm trying to remember. Very little. I mean if the conversations were so negligible and so inconsequential that I can't even remember them that's how much they were. In other words, let me put it this way, in drawing the plan at any stage of the game I drew it purely [72] on my own, from my own knowledge, and without consulting very many people, I can assure you.

Q. I take it you did not consult anyone from the Connecticut Public Expenditure Council A. You can believe I didn't.

Q. Nor did you contact any person associated as a political scientist or statistician or of like employ with any of the universities or colleges in the state or the country? A. As I said earlier, I discussed Congressional redistricting with Professor Ladd of the University of Connecticut and one of his associates and came away convinced that they didn't know very much about it and their information wasn't very good, what they were doing wasn't very good. For example, the University of Connecticut gave one of the local newspapers a plan on the House what was printed in the paper and Judge Saden asked me if I would take that plan, I believe it was based on a hundred-twenty-five seat House, as I recall, he asked me if I'd take the plan and give him some sort of statistical breakdown on it, both population and political. I had already done it even before he asked me and the statistical breakdown was terrible, the deviation in the House was very large, the plan was obviously thrown together in a hurry, it had mistakes all over the place, and in general it was typical of their operation as a whole so we ignored it.

[73] Q. Did you contact or speak about the plan that you were devising with anyone who represented the unaffiliated voters or the independent voters of the state? A. Well, I don't always ask people I talk to whether they are affiliated with the Republican or the Democratic party so I might very well have talked to a few independents and not known it.

Q. But you as such did not—you did not solicit as such the opinion or the advice of anyone known to you to be unaffiliated or representing unaffiliated people? A. No, for the simple reason that we're predicating it as far as the political aspects of it, predicating it all on total vote and I assume that independent people vote, I mean statistically I can prove that they do, so I'm sure their votes

are reflected in the total vote. Therefore they are accounted for in the plan along with everybody else, no differently.

Q. Did you in any way attempt to assess the effect of the plan which was ultimately devised and now published as the plan as to its effect on the unaffiliated voters of the various Assembly Districts? A. Well, the fact of the matter is it will probably make them a little more powerful in some areas, certainly in these swing areas, I would think your unaffiliated voters are going to have more to say than in the past.

[74] Q. Is this a guess? A. A guess.

Q. Do you have any statistics to back that up? A. None. It's just a guess. There are more swing areas now than there were under the old plan so therefore by definition I would assume your unaffiliated voters would have a little more power than they did under the old plan. That's just a guess.

Q. You're referring now to—well, I'll withdraw that. Throughout the deliberations and the activities that you conducted to devise the plan you're basing your definition of political fairness or political balance—wait a minute, let me finish the question—you're basing your judgment of political balance on the election results of '66, '68 and '70, were you not? A. Yes.

Q. Now if those election results were somehow skewed one way or both ways depending on the years that in turn would throw off the judgmental factor of political balance that you arrived at in your plan, would it not? A. Certainly, but it was the best means available of doing it. What other means is there?

Q. You did not attempt to select some other indicator for political balance, did you? A. I'm not aware of any other indicator that we could [75] have used. I don't believe registrations would be a political indicator for the simple reason it would have been too difficult to get the registration figures in any divided plan, it would be impos-

sible, you'd be guessing totally, so therefore we never even considered it, it never came into consideration.

Q. In a sense is it fair to say that the election statistics were a very good indicator of the party registration? A. No, I wouldn't say that's true. The election statistics are a pretty fair indicator of how people vote in that particular area.

Q. Had you had available to you the registration statistics would you have used those in lieu of the election statistics? A. No. I don't think they are very valid. I have done a lot of research on elections in Connecticut in the last fifteen years and I would say voter registration figures are very—of little value in predicting an election result. I can give you specific illustrations if you're interested but it has nothing to do with this.

Mr. Beizer: If I can just take a second to review what I've got. I have no further questions.

Mr. Lapp: No questions.

Mr. McCarthy: No questions.

Mr. Satter: I have just one.

[76] By Mr. Satter:

Q. I'm almost through. Mr. Collins, you didn't bring with you any data, did you, any notes or any materials? A. Not a thing.

Q. I want to ask you whether you could submit to Mr. McCarthy so that we don't have to adjourn this deposition your identification of what you deemed to be under the plan the safe Republican Senate Districts, the safe Democratic Senatorial Districts and the swing Senatorial Districts, and also what you deem to be the safe Republican Assembly Districts, the safe Democratic Assembly Districts, and the so-called swing Assembly Districts. A. I would do so if Mr. McCarthy tells me to, yes.

Q. Well, Mr. Collins, if you feel that you would not, you can't tell me that you would do it then I would want to adjourn this deposition and give you a day or two to

prepare them and then put it on the record. A. I assure you I already have it prepared.

Q. Would you mind then giving it to Mr. McCarthy? A. I'll give it to Mr. McCarthy, yes, and then you can discuss it with him.

Q. Well, if Mr. McCarthy won't give it to me then I'll request that this deposition be adjourned and then we'll put you on the record again, but if you're willing to give it to Mr. McCarthy so that I get it we can terminate the deposition.

[77] By Mr. McCarthy:

Q. Let me inquire. In what form is your data available?

A. Basically by numbers. In other words, for example, in Senate District 1, 2 and 3, guaranteed Democratic; 4, probably Republican. District 5, swing, probably Democratic; District 6, solid Democratic; District 7, solid Democrat; District 8, Republican; District 9 Republican; District 10 and 11 Democrat, solid; District 12, Republican, solid. District 13, Democrat, solid; District 14, swing, Republican; District 15, 16, 17, solid Democrat; District 18, swing, Republican; District 19, solid Democrat; District 20, swing, Republican; District 21, solid Republican; District 22 and 23, solid Democrat; District 24, solid Republican; District 25 and 26, solid Republican; District 27, swing, Democrat; District 28, Republican; District 29, Democrat, solid; District 30, Republican, solid; District 31, Democrat, solid; District 32, Republican, solid; District 33, swing either way; District 34 solid Republican; District 35, swing either way; District 36, solid Republican.

Q. Thank you. A formidable performance which I think moots the inquiry as to the judgmental values concerning the Senate. I truly hesitate to tax your competency in asking for a duplicate performance with respect to the House. A. If you will give me the list I'll give it to you right here. If you have the list, the actual board plan on [78] the House.

Mr. Satter: Do you want a map?

By the Deponent:

A. A map would be easier. On the House 1 through 8 is solid Democrat; 9 is swing; 10, 11, Democrat; 12, swing Democrat—

Mr. Beizer: Excuse me. Just for purposes of form—

The Deponent: Towns do you want?

Mr. Beizer: You're using various terms and I suppose they are interchangeable, straight, strong, you said solid Democrat, 1 through 8—

Mr. McCarthy: Let's not interrupt the chain of thought.

Mr. Satter: We're satisfied with this. This is fine. Let him explain it.

Mr. McCarthy: Let him explain the terms after he has finished.

Mr. Satter: You'll have the record anyway.

By the Deponent:

A. 12 is swing Democrat; 13 is swing Republican; 14 is swing Republican; 15 is solid Democrat; 16, solid Republican; 17 is swing; 18 is solid Democrat; 19, Republican; 20, swing, probably swing Republican but swing; 21 is Republican; 22 is swing Republican; 23, 24, 25 and 26, solid Democrat, 27 is [79] Republican; 28, Republican; 29, swing Republican; 30, Republican; 31, Republican; 32, Democrat; 33, Democrat; 34, Democrat; 35, Republican; 36, Republican; 37, Republican; 38, Republican; 39, 40 Democrat; 41, swing Republican; 42, Republican; 43, Republican; 44, Democrat; 45, Democrat, 46, swing Republican; 47, Democrat; 48, Democrat; 49, Democrat; 50, Republican; 51, Democrat; 52, Republican; 53, swing Republican; 54, Democrat; 55, Republican; 56, Democrat; 57, Republican; 58, Democrat; 59, Democrat; 60, Democrat; 61, Republican; 62, Republican; 63, Republican, 64, swing Republican; 65, Democrat; 66, Republican; 67, Republican; 68, Republican; 69, Republican; 70, Democrat; 71, Demo-

crat; 72, 3, 4 and 5, Democrat; 76, Democrat; 77, 78, 79, 80, 81, Democrat; 82, Democrat; 83, Democrat; 84, Democrat 85, Democrat; 86, swing Republican; 87, Republican, 88, Republican; 89, Republican, 90, Republican; 91, Democrat; 92, 93, 94, 95, 96, 97, 98, 99, Democrat; 100, Republican, 101, Republican; 102, Republican; 103, Democrat; 104, Democrat; 105, Republican; 106, Republican; 107, Republican; 108, Republican; 109, 110, Democrat; 111, Republican; 112 Republican; 113, Republican; 114, Republican; 115, 116, Democrat; 117 swing Republican; 118, 119, Republican; 120, Republican; 121 swing Republican; 122, Republican; 123, Republican; 124 through 131, Democrat; 132, Republican; 133, Republican; 134, Republican; 135, Republican; 135, Republican; 137, 8, 9 and 140, Republican; 141, Republican; 142, Republican; [80] 143, Republican; 144 and 145 I believe are Republican; 146 and 7 are Democrat; 148 is Republican; 149, 150 and 151 are Republican.

That's why I didn't bother with some of the Districts that are close. Where I'm positive they are swing I said it and others that are close but I didn't bother to give them all.

Mr. Satter: That finishes mine.

Mr. McCarthy: Mr. Beizer wants some elucidation on judgmental—

The Deponent: I started eliminating the swings as I went along. It gets too confusing. When I actually do it I break it down into a guaranteed Democrat, guaranteed Republican, probable Democrat; probable Republican; swing Democrat and swing Republican and swing; seven categories if you're really going to break it down, but again it's all judgment.

By Mr. Beizer:

Q. But again, not to beat a dead horse, but there is obviously some judgmental factor involved? A. You'd better believe it.

Q. Is there some reference, though, when you get to the election results, some reference to the number of votes that

you anticipated that a Republican would carry the District by so as to make it clearly, in your words, Republican? [81] A. Well, what we did is, we had the election totals for the House, totals in the House for '68, '66 and '70, and you can estimate from there approximately what's going to happen. In some areas it's impossible because you couldn't break it down, break the town down, I mean. A perfect illustration, for example, would be the town of Mansfield. The town of Mansfield is one voting District and therefore like on the Senate cut when you're cutting Mansfield in half roughly how one half of the town is going to vote against the other half you're just guessing because there's no way you can tell. The same is true in some of the other areas. If you're cutting voting districts into pieces you're just guessing where people live.

Q. I understand that, but all that aside after the estimates are made how much plurality would there have to be before you would call it Republican? A. I don't do it by that. I do it by feel. I just feel that particular area on balance is going to go Republican or feel it's going to go Democrat. I'll give you an illustration on the Senate, for example. Take West Hartford, Jackson carried West Hartford forty-five hundred votes in 1968 so therefore in 1972 if Nixon runs exactly the same as he did in 1968 Jackson is going to win again because if he comes out of West Hartford with forty-five hundred voltes he'll pick up maybe a thousand in Avon and possibly a thousand or twelve [82]hundred in Simsbury and he's going to win by two thousand, twenty-three hundred votes, so is it a swing District? I say it is but it's probably going to go Democratic in 1972. In 1974 if Meskill runs as well in West Hartford in '74 as he did in 1970 and the vote totals were pretty much the same as then Jackson would lose because he only carried West Hartford by about nine hundred votes in 1970, and if you add in a thousand again in Avon and Simsbury he would lost by twelve hundred votes. That's my estimate. On the other hand it's pretty hard to say

what's going to happen in '72 and '74. I can only predicate it on the past experience, that's all.

Mr. Beizer: Thank you.

(Whereupon the witness was excused and the taking of the deposition was concluded at 1:57 P.M.)

Fact Stipulation in District Court

[Caption omitted]

Signed by ROBERT SATTER,
Attorney for Plaintiffs

THEODORE R. CUMMINGS, ET AL.
and by FRANCIS J. MCCARTHY,
Attorney for Intervening
Defendant J. BRIAN GAFFNEY

The parties hereto stipulate to the following:

1. Attached hereto is the "Plan of Districting For The General Assembly of the State of Connecticut dated September 30, 1971" (hereinafter referred to as the "Plan") as adopted by the majority of the Board acting pursuant to Article III, Sections 6 d and 6 3 of the Connecticut Constitution.

2. The population of the State of Connecticut, according to the 1970 census, is 3,032,217.

3. The Plan provides for a House of Representatives consisting of 151 members, each elected from a single assembly district.

4. With a population of 3,032,217 and 151 assembly districts, the perfect number of people in each assembly district should be 20,081.

5. The Plan provides for a Senate consisting of 36 senators, each elected from a single senatorial district.

6. With a population of 3,032,217 and 36 senatorial districts, the perfect number of people in each senatorial district should be 84,228.

7. The population of assembly districts created by the Plan deviates from the perfect average of 20,081 by a maximum of plus 3.93% or 789 people, and by a minimum of 3.90% or 784 people for a total deviation of 7.83%.

8. The population of 39 assembly districts under the Plan or 25.83% of the 151 assembly districts, deviates from the perfect average of 20,081 by plus or minus 3.0 to 3.93%. The population of 34 assembly districts, 22.52% of the total, deviates by plus or minus 2.0% to 2.99%; the population of 47 assembly districts, 31.12% of the total, deviates from 1.0% to 1.99%, and the population of the remaining 31 assembly districts of the total of 151 assembly districts, 20.53% of the total, deviates from 0.0% to 0.99%.

9. The average deviation from perfect equality for all the assembly districts under the Plan is 399 people or 1.9% and a mean deviation from perfect equality for all the assembly districts is 372 people or 1.8%.

10. The ratio of the largest assembly district to the smallest assembly district under the Plan is 1.082 to 1.

11. The population of senatorial districts created by the Plan deviates from the perfect average of 84,228 by a maximum of plus 0.88% or 745 people and by a minimum of minus 0.93% or 787 people for a total deviation of 1.81%. The average deviation from perfect equality for all the senatorial districts is 379 people or .45% and a mean deviation from perfect equality for all the senatorial districts is 392 people or .47%.

12. The ratio of the largest senatorial districts to the smallest senatorial district under the Plan is 1.018 to 1.

13. The smallest number of people needed to elect a majority in the House of Representatives (sometimes known as the electoral percentage) is 49.33%.

14. The smallest number of people needed to elect a majority in the Senate (the electoral percentage) is 52.54%.

15. The boundary lines of 47 towns are cut under the Plan so that one or more portions of each of these 47 towns are added to another town or a portion of another town to form an assembly district.

16. 29 of the aforesaid 47 towns have their boundary lines cut more than once resulting in more than one portion of the town being added to another town or a portion of another town to form an assembly district. If a segment of a town is defined as a portion of a town being used to form an assembly district not wholly within that town, the Plan creates 78 segments of towns in the formation of 151 assembly districts.

17. 55 of the 151 assembly districts involve the segmenting of towns in the formation of assembly districts and 96 assembly districts are wholly within town boundaries or are formed by the combination of entire towns.

18. 23 towns are segmented to create senatorial districts under the Plan.

19. The boundary lines of assembly districts do not mesh with the boundary lines of senatorial districts. 81 assembly districts under the Plan are not located entirely within a senatorial district and in 48 of these 81 assembly districts, a division between two senatorial districts occurs within a town.

20. The smallest units of census data available to the Reapportionment Board were block groups within

census tracts and enumeration districts. The average population of block groups is between 1200 and 1250 people. The average population of enumeration districts is between 750 and 800 people. There is total of approximately 2,750 block groups and enumeration districts; of these about 80% are block groups and about 20% are enumeration districts. Of these approximately 2,750 census areas the Board had to work with, the average area contained approximately 1100 people, and the mean area contained approximately 1000 people; 88% of this total of 2,750 areas exceeded 400 people in size.

21. Annexed hereto is a breakdown of the population of senatorial and assembly districts prepared by the United States Department of Commerce, Bureau of the Census, from the results of the census as of April 1, 1970.

Dated at Hartford, Connecticut this 6th day of March, 1972.

ROBERT SATTER, Attorney for the Plaintiffs Theodore R. Cummings, et al

DAVID B. BEIZER, Attorney for the Intervening Plaintiffs Nancy Aroni, et al

ROBERT K. KILLIAN, Attorney General, Attorney for the Defendants Thomas J. Miskill, Governor of the State of Connecticut, et al

FRANCIS J. MCCARTHY, Attorney for the Intervening Defendant J. Brian Gaffney

State Aid Grants (Pl. Ex. 2)

Following is a list of State Aid Grants to towns that are in effect block grants rather than a state-share matching grant. These grants are computed on statutory formulas:

Highway Town Aid $13 million 13a—175a,d

Funds are allocated to towns through a formula including local road milage and population

Education

Per-pupil grants $140.7 on 10-260—10-265

Payments are made based on $210 per pupil in average daily membership.

Disadvantaged Children $8.5 million 10-266a —10-266e

Funds are allocated to towns through a formula including the number of families with annual income less than $4000 and the number of children receiving Aid to Dependent Children.

Property Tax Relief Grants

Per-pupil grants $10 million S.A. 1, 1971 June Session

Payments are made based on $15 per pupil in average daily membership.

Population etc. $7.15 million 8-159(a)

Payments are made based on population, population density and public housing units.

Disadvantaged Children $4.5 million 10-266 (k)

Payments are made on disadvantaged children formula above.

Reimbursement of Local Property Tax on Manufacturers Inventory $7.2 million 12-24a

State pays a percentage of local taxes based on valuation of manufacturers inventories.

Local Property Tax Relief to the Elderly $4 million 12-129d

State pays each town the amount lost through property tax relief granted the elderly.

Reimbursement of Local Property tax on Mercantile Inventory $150,000 12-24c

State pays a percentage of local taxes based on valuation of mercantile inventories.

Reimbursements to Towns for Loss of Taxes on State Property $1.9 million 12-19a,b

Funds are prorated among towns with tax exempt state property based on the value of state property and total taxable property.

Following is a list of grants or payments to towns based on a reimbursement of town program expenses or statutory distribution of fees:

Dog License Fees
Corporation Filing Fees
Community Development Grants
Algae Control
Improvement of Town Health Services
Clinics for Mentally Retarded
Education
Aid to Industrial Arts
Special Education for Handicapped
Transportation
Adult Education
Children on State Property
Vocational Agriculture
Driver Education

Adult Basic Education
Health Education
Occupational Training
School Buildings
School Lunches
Tuition for Blind
Services for Blind
Public Libraries
Welfare Town Aid
Elderly Centers
Judicial Fines
Circuit Court Rentals
Elderly Housing
Urban Renewal
Open Space Grants
Clean Water Grants
Airport Facilities
Air Pollution Grants

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Census Certification of Population of Senate and Assembly Districts in Apportionment Board Official Plan (Record on Appeal, Vol. III, Appendix to District Court Opinion)

U.S. DEPARTMENT OF COMMERCE
Social and Economic Statistics Administration
BUREAU OF THE CENSUS
Washington, D.C. 20233
OFFICE OF THE DIRECTOR

Population of Senate Districts Derived From the Board Plan of Districting of the General Assembly of the State of Connecticut Submitted to the Secretary of State of Connecticut on September 30, 1971

Senate District Number	Population of District According to Official United States Census Results as of April 1, 1970
1	84,273
2	84,973
3	84,459
4	83,580
5	84,547
6	83,441
7	84,708
8	84,749
9	83,787
10	84,828
11	84,779
12	83,458
13	83,612
14	83,822
15	83,838
16	84,631
17	84,299
18	83,996
19	84,622
20	83,903
21	83,581
22	84,209
23	84,484
24	84,247
25	84,543
26	84,376
27	83,990
28	83,678
29	84,541
30	84,878
31	83,801
32	84,166
33	83,999
34	84,864
35	83,992
36	84,563

U.S. DEPARTMENT OF COMMERCE
Social and Economic Statistics Administration
BUREAU OF THE CENSUS
Washington, D.C. 20233
OFFICE OF THE DIRECTOR

Population of Assembly Districts Derived From the Board Plan of Districting of the General Assembly of the State of Connecticut Submitted to the Secretary of State of Connecticut on September 30, 19[illegible]

Assembly District Number	Population of District According to Official United States Census Results as of April 1, 1970
1	19,337
2	19,840
3	19,814
4	19,521
5	19,455
6	19,402
7	20,469
8	20,179
9	20,674
10	20,101
11	20,571
12	20,067
13	19,302
14	20,415
15	20,753
16	19,448
17	19,842
18	20,418
19	20,841
20	20,767
21	20,395
22	19,934
23	19,472
24	20,216
25	20,016
26	20,536
27	19,686
28	19,504
29	19,297
30	19,464
31	20,651
32	20,455
33	20,870
34	20,843
35	20,818
36	19,592

[45?23]

sembly District Number	Population of District According to Official United States Census Results as of April 1, 1970
37	19,638
38	20,136
39	20,556
40	20,769
41	20,166
42	20,311
43	19,688
44	20,227
45	20,359
46	20,837
47	20,815
48	19,479
49	20,648
50	20,403
51	20,378
52	20,327
53	19,752
54	19,994
55	19,760
56	19,551
57	19,871
58	20,167
59	20,553
60	20,549
61	20,726
62	20,071
63	20,817
64	19,971
65	20,748
66	19,559
67	20,237
68	19,825
69	19,971
70	20,016
71	20,704
72	19,709
73	19,736
74	20,394
75	20,435
76	20,394
77	20,360
78	19,554
79	20,426
80	20,435
81	20,536

COPY PRINTED CLOSE TO EDGE

Assembly District Number	Population of District According to Official United States Census Results as of April 1, 1970
82	20,856
83	20,057
84	20,524
85	20,297
86	20,717
87	19,842
88	20,606
89	20,375
90	20,181
91	19,998
92	19,798
93	20,636
94	20,555
95	20,138
96	20,530
97	20,271
98	20,549
99	20,350
100	20,654
101	20,035
102	20,444
103	20,806
104	20,626
105	20,802
106	20,281
107	20,633
108	19,919
109	19,609
110	19,703
111	20,439
112	19,413
113	19,799
114	19,406
115	19,466
116	19,504
117	19,805
118	19,487
119	19,565
120	20,013
121	19,525
122	19,536
123	19,300
124	19,330
125	19,317
126	19,831
127	19,960
128	19,359

[AS7251]

Assembly District Number	Population of District According to Official United States Census Results as of April 1, 1970
129	19,375
130	19,586
131	19,784
132	19,671
133	19,725
134	19,886
135	20,283
136	19,433
137	19,463
138	20,063
139	19,570
140	20,017
141	20,411
142	20,094
143	19,439
144	19,725
145	20,030
146	20,005
147	20,217
148	20,315
149	20,135
150	19,812
151	19,808

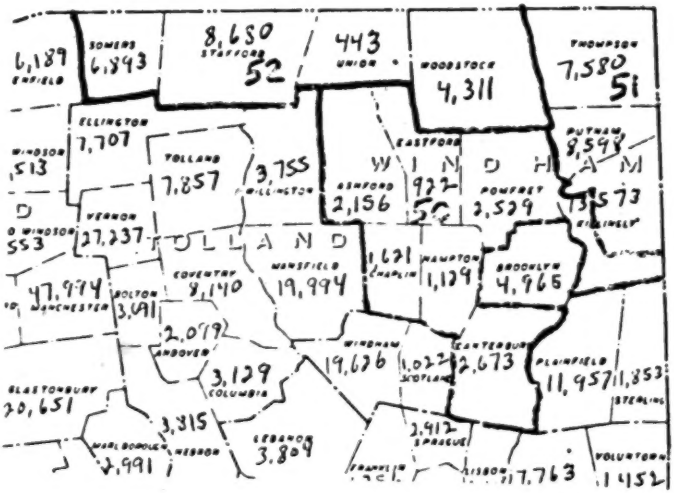
H Lane Farrance

for GEORGE H. BROWN
Director
Bureau of the Census

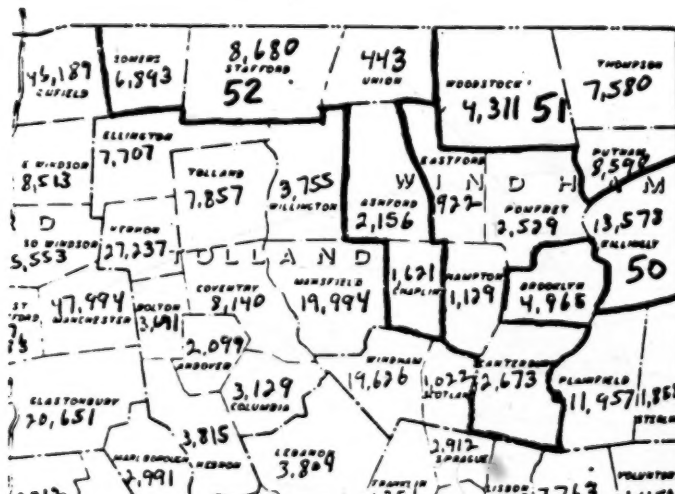
COPY PRINTED CLOSE TO EDGE

Killingly Area, Board House Plan and Alternate Plan (Pl. Exs. 5, 5A)

Board House Plan

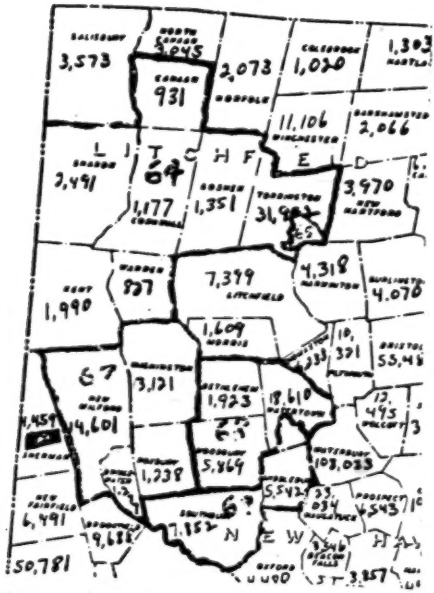


Alternative Districts Not Cutting Killingly

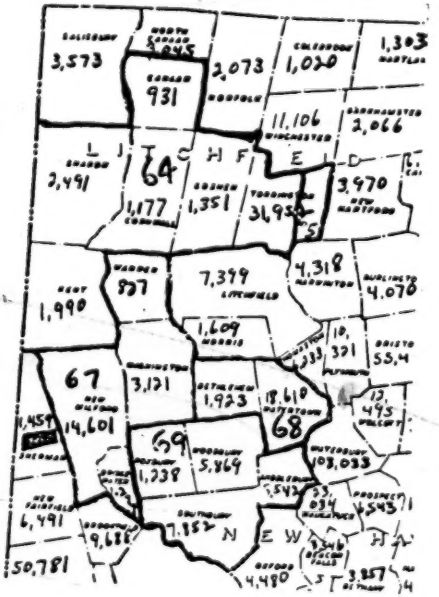


Watertown Area, Board House Plan and Alternate Plan
(Pl. Exs. 6, 6A)

Board Plan

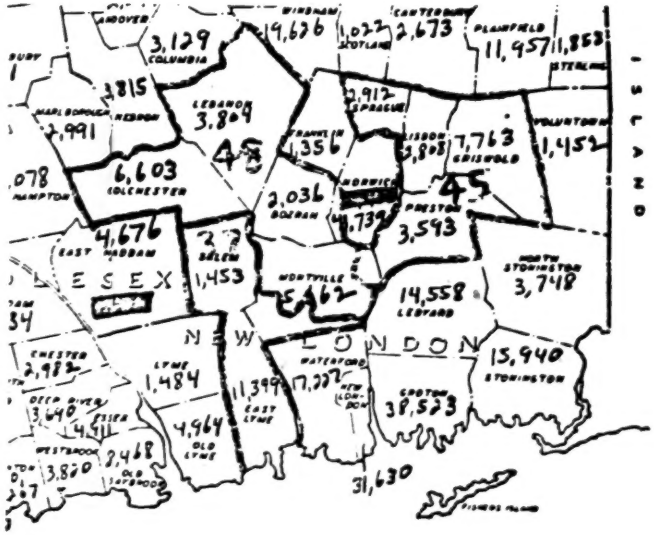


Alternative District Not Cutting Watertown

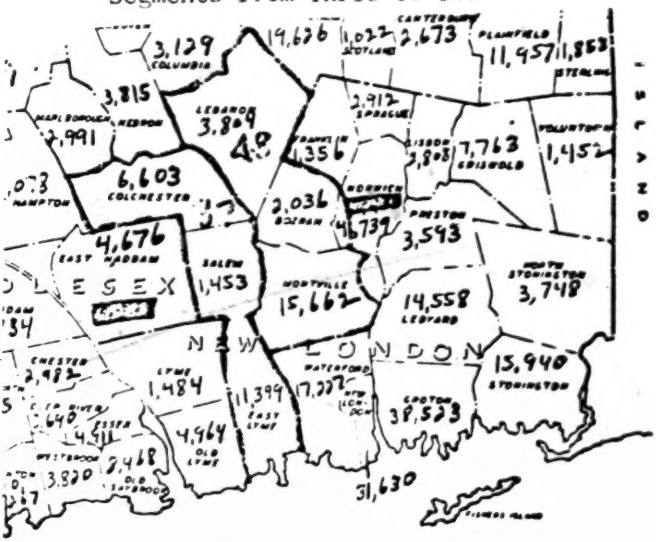


Montville Area, Board House Plan and Alternate Plan (Pl. Exs. 7, 7A)

Board Plan

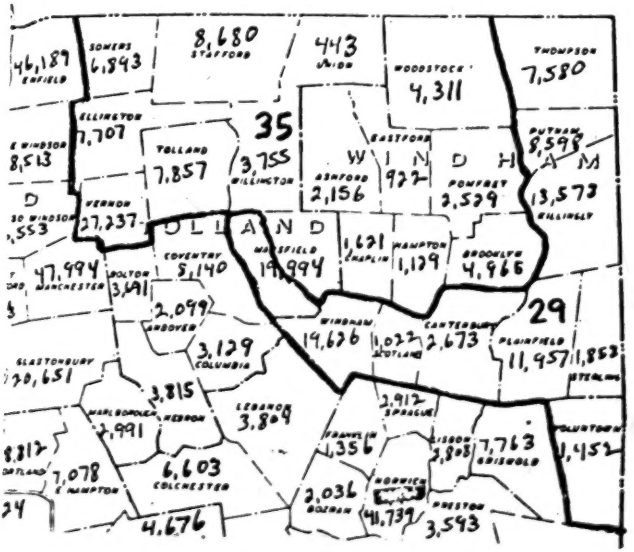


Alternative Districts Reducing Montville's Segments from Three to Two

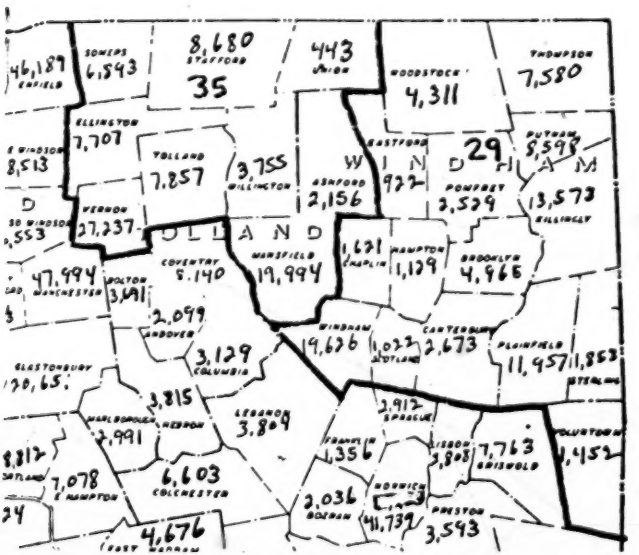


Senate Districts 29 and 35, Board Plan and Alternate Plan (Pl. Exs. 15, 15A)

Board Senate Plan

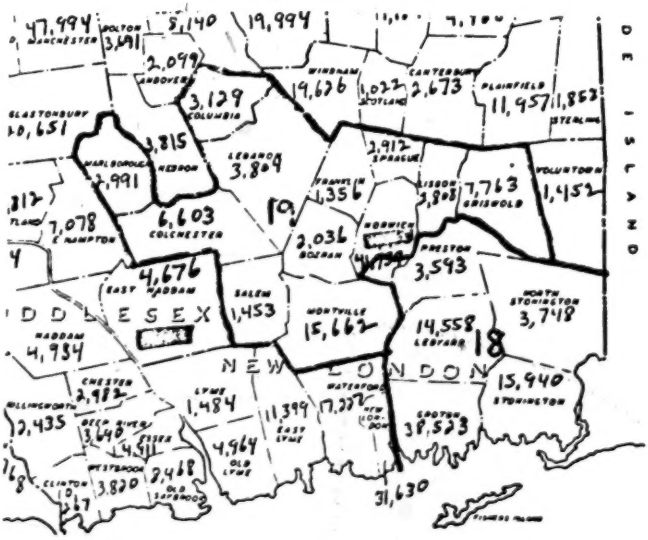


Alternative Shape for No. 29

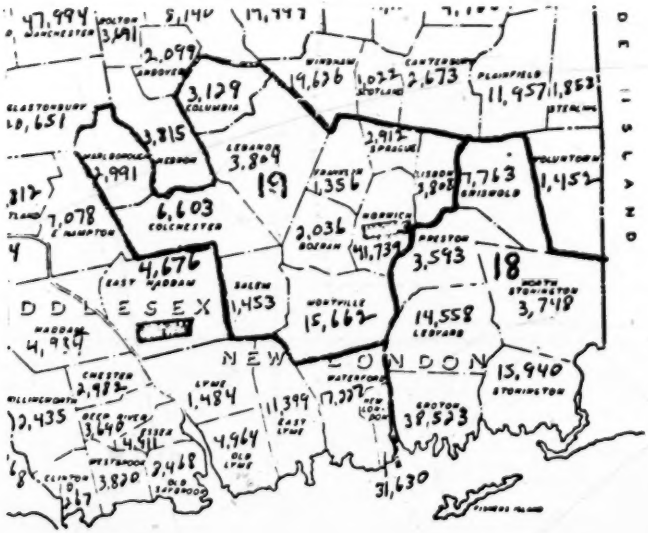


Senate Districts 18 and 19. Board Plan and Alternate Plan (Pl. Exs. 16, 16A)

Board Senate Plan



Alternative for No. 18 and 19



Senate Districts 9 and 31, Board Plan and Alternate Plan (Pl. Exs. 17, 17A)

Board Senate Plan

Alternative for No. 9 and No. 31

Outlines of Selected House and Senate Districts
(Pl. Ex. 19)

State of Connecticut

GENERAL ASSEMBLY

ROLLIN METTL
61 CARNALT
HAMDEN, CONN

STATE REPRESENTA
96TH ASSEMBLY DIS

February 11th, 1972

The attached exhibits are outline drawings of House and Senate Districts contained in the Board Plan of October, 1971 which demonstrate examples of non-contiguity and non-compactness.

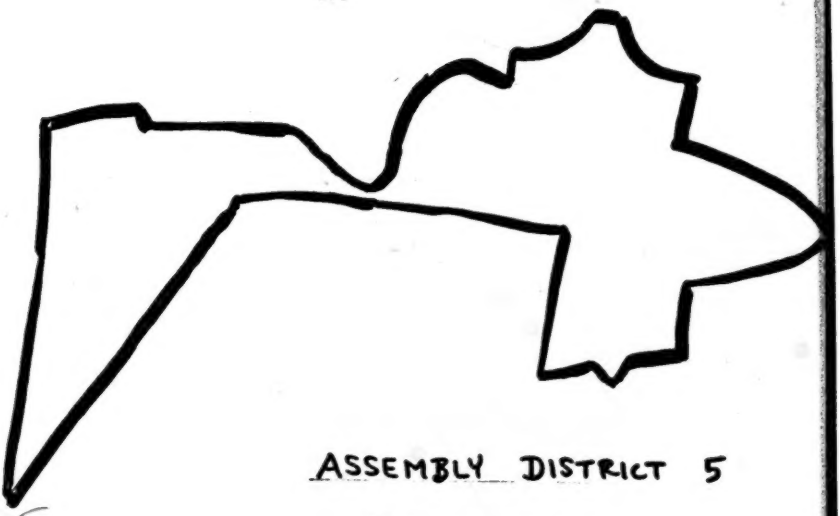
The outlines were drawn using U. S. Bureau of the Census or State of Connecticut maps; as a result, the scales vary. A scale is given on each individual map for reference and comparison.

Assembly District maps are identified with the prefix "H" followed by the district number; Senate district maps are identified with the prefix "S" followed by the district number.

The maps are in numerical order starting with "H."

The maps were prepared by the staff of the Joint Legislative Committee on Redistricting and Reapportionment.

Rep. Rollin Mettler, Jr. (96th)
Co-Chairman

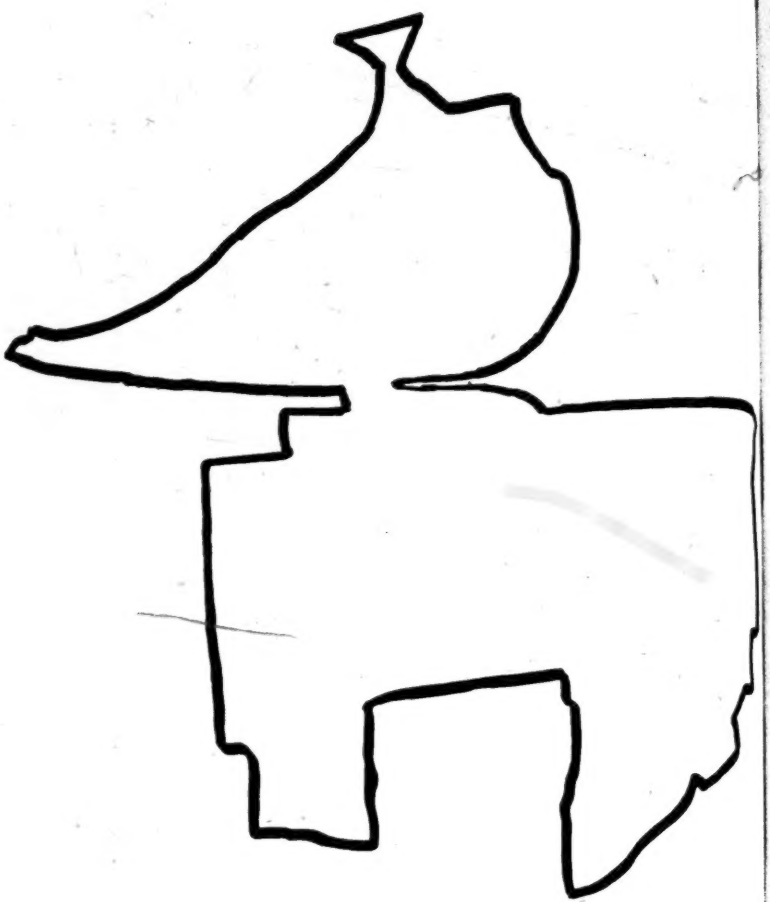


ASSEMBLY DISTRICT 5

BOARD PLAN

——— ½ MILE

H-5

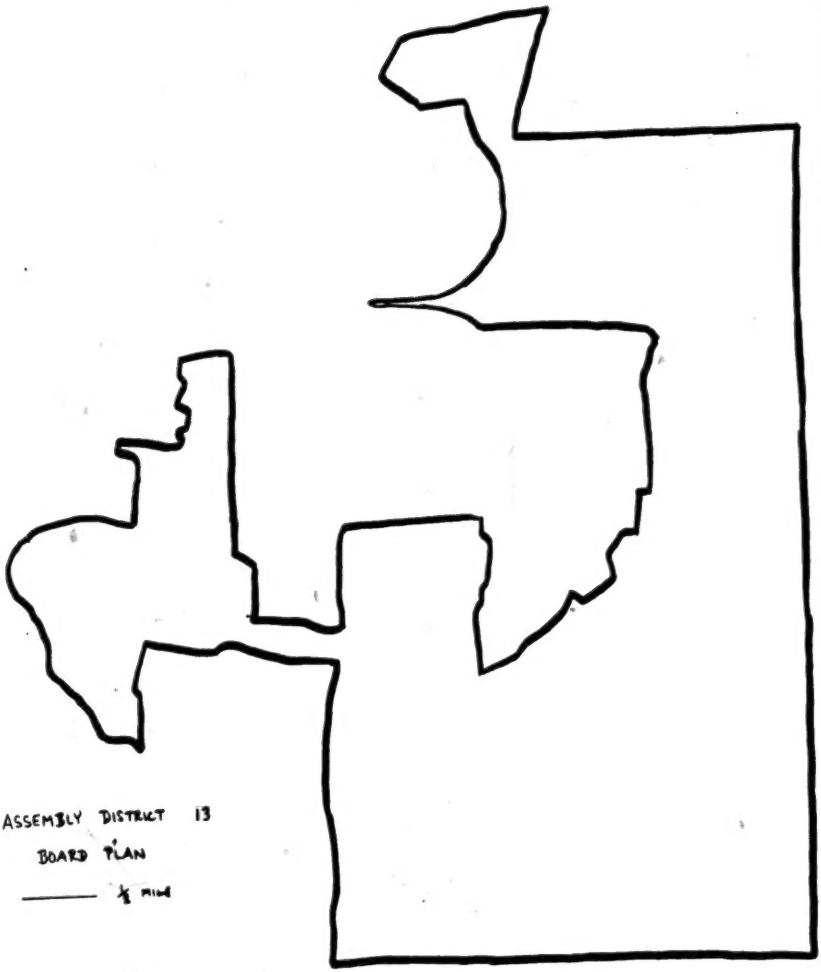


ASSEMBLY DISTRICT 12

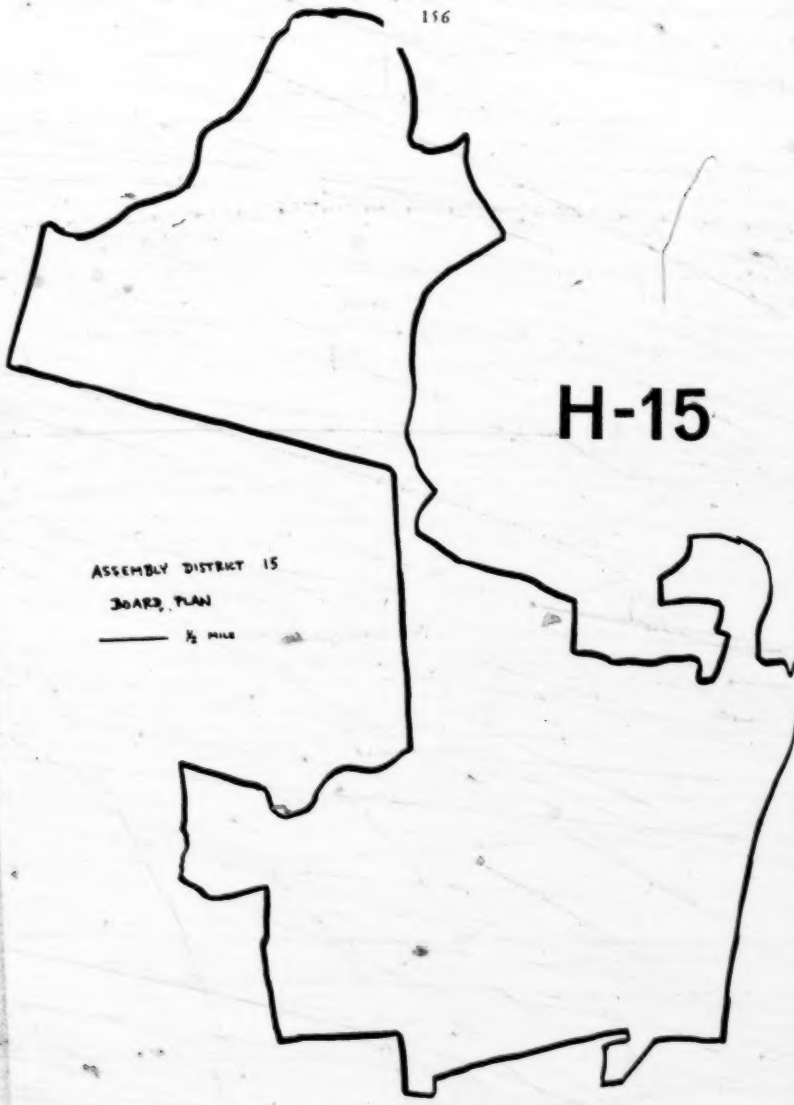
BOARD PLAN

½ MILE

H-1



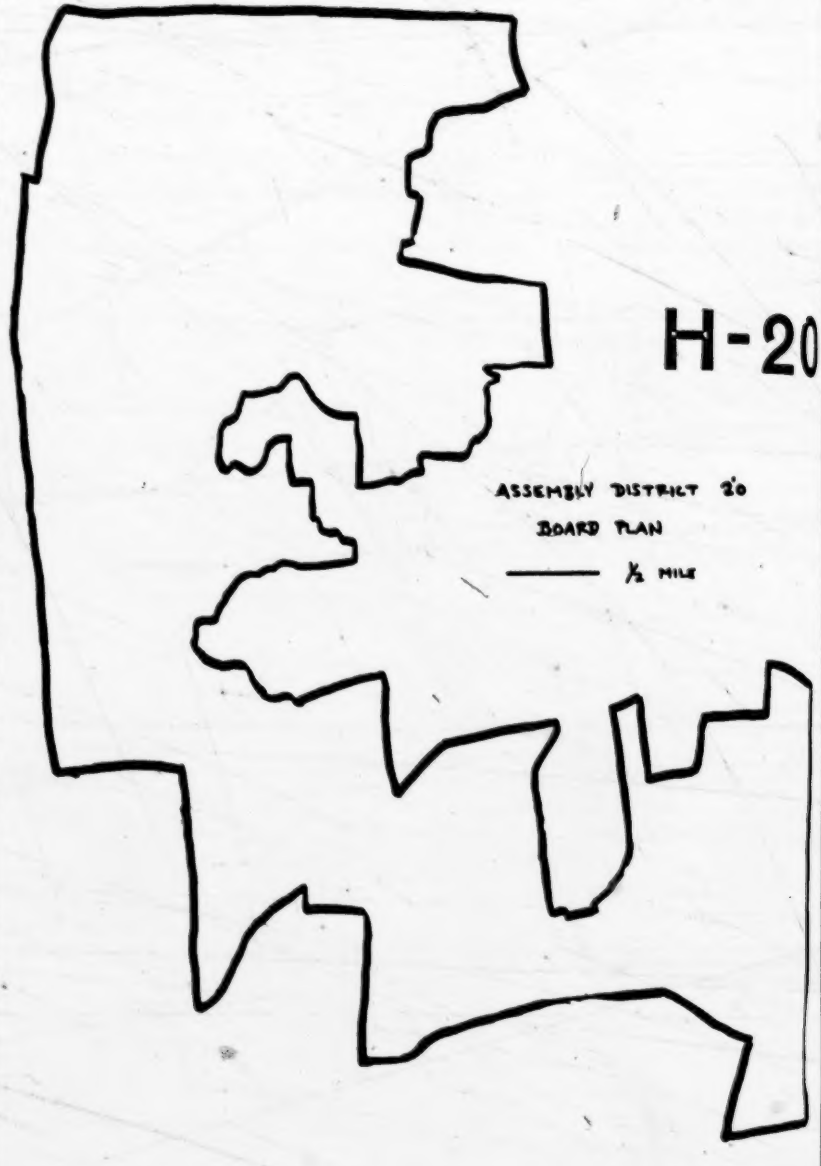
H-13


H-15
ASSEMBLY DISTRICT 15
BOARD PLAN
½ MILE

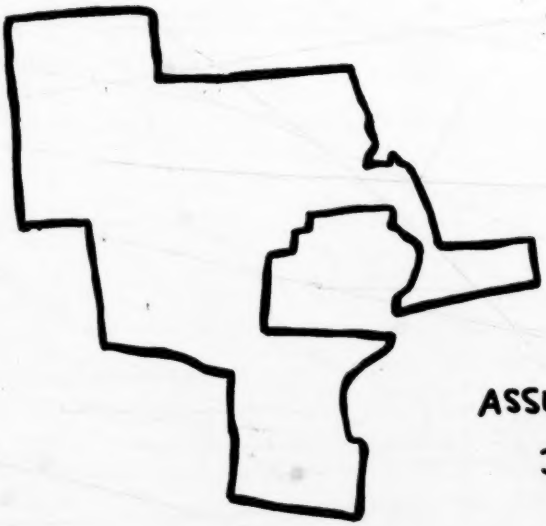
ASSEMBLY DISTRICT 19

BOARD PLAN

——— ½ MILE


H-20
ASSEMBLY DISTRICT 20
BOARD PLAN
½ MILE

ASSEMBLY DISTRICT 41
BOARD PLAN
1/2 mile
H-41



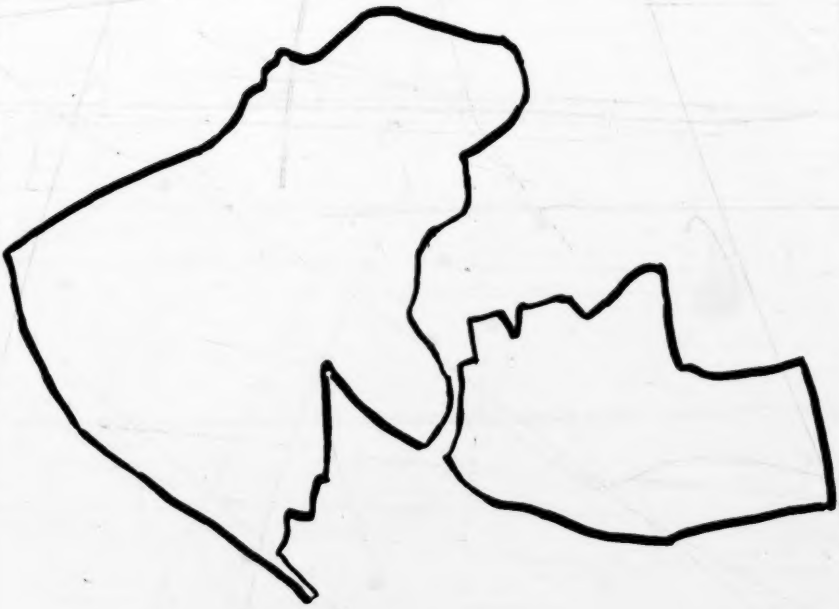
ASSEMBLY DISTRICT
BOARD PLAN

1 5 MILES

H-50

ASSEMBLY DISTRICT 85
BOARD PLAN
½ mile
H-85

ASSEMBLY DISTRICT 88
BOARD PLAN
½ MILE
H-88



ASSEMBLY DISTRICT 104

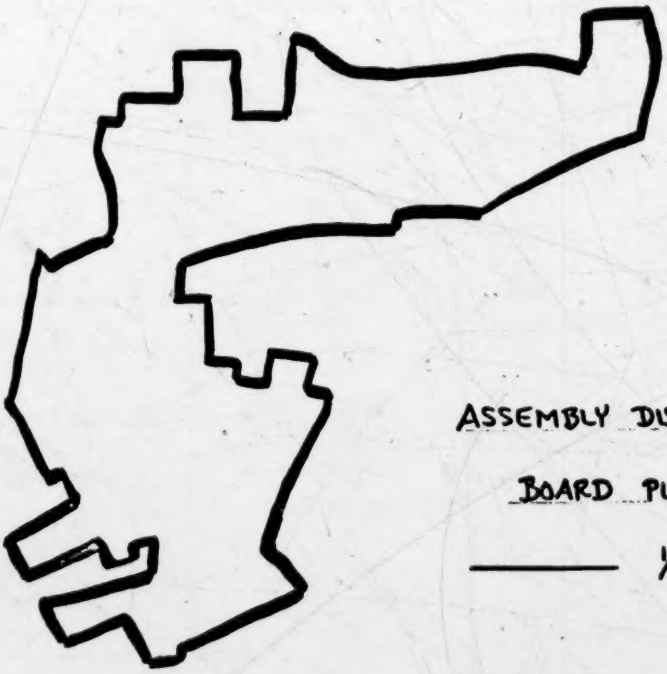
BOARD PLAN

½ MILE

H-104

ASSEMBLY DISTRICT 122
SOLID PLAN
H-122

H-125
ASSEMBLY DISTRICT 125
BOARD PLAN
½ MILE

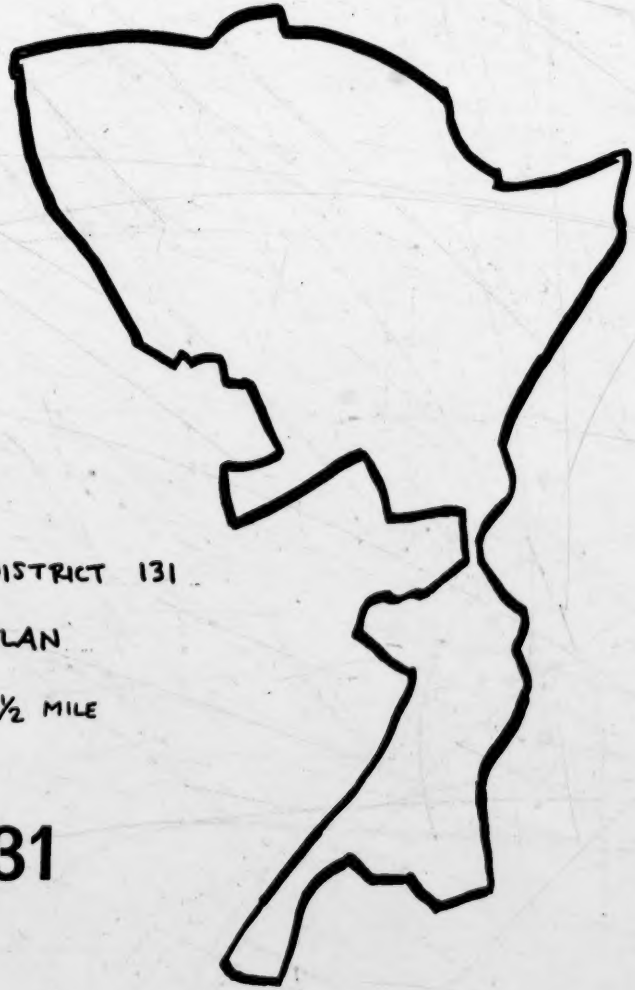


ASSEMBLY DISTRICT 12

BOARD PLAN

——— ½ MILE

H-127

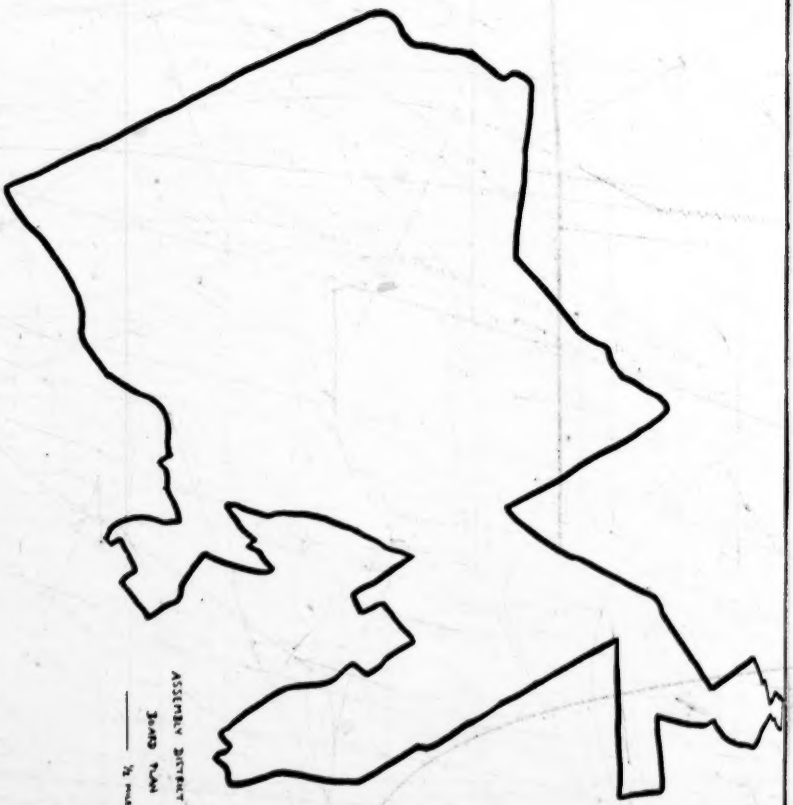


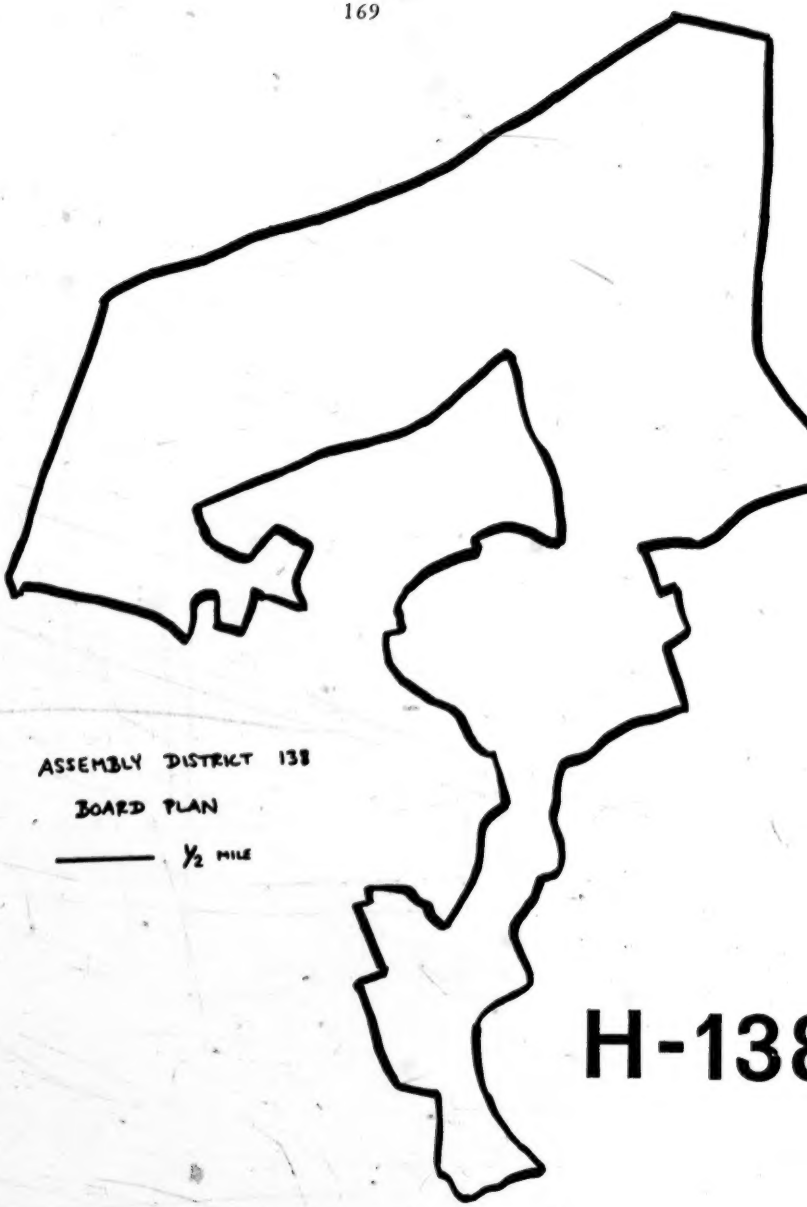
ASSEMBLY DISTRICT 131

BOARD PLAN

——— ½ MILE

H-131


ASSEMBLY DISTRICT 134
H-134


ASSEMBLY DISTRICT 138
BOARD PLAN
½ MILE
H-138

ASSEMBLY DISTRICT 140

BOARD PLAN

——— ½ MILE

H-140

4th SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

S-4

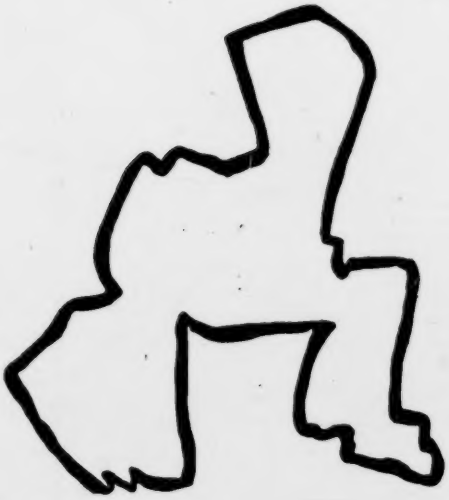
9th SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

S-

10th Senatorial District
Board Plan
½ mile
S-10



17th SENATORIAL DISTRICT

BOARD PLAN

1 0 5 MILES

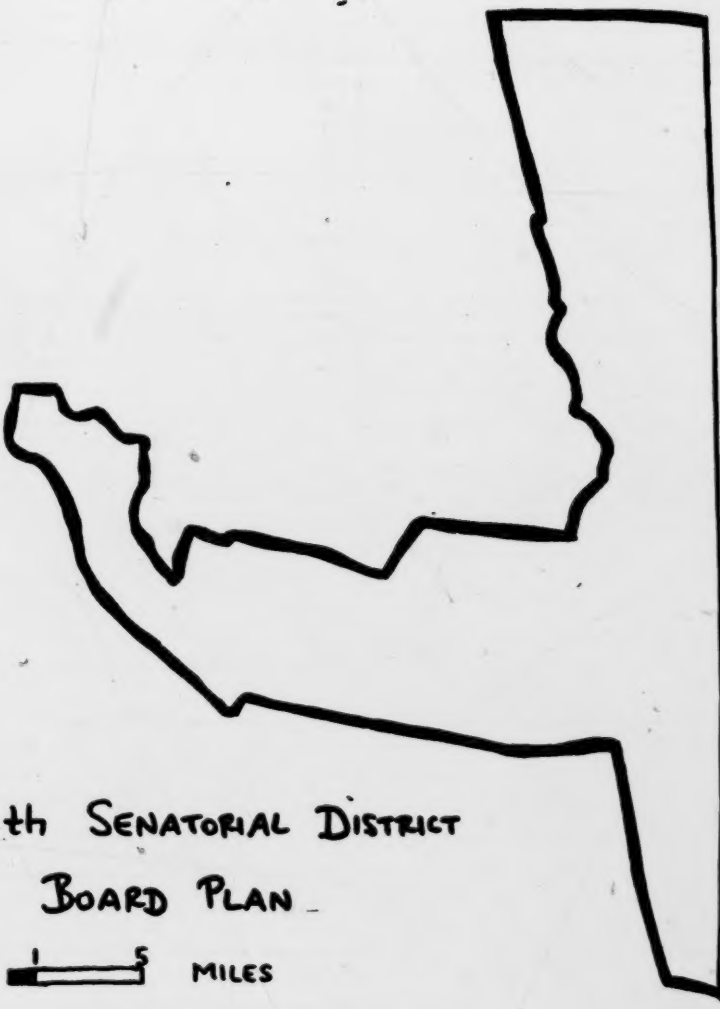
S-17

28 th SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

S-28



S-29

32nd SENATORIAL DISTRICT

BOARD PLAN

1 0 1 MILES

S-32

Plaintiffs' House Plan. Maximum Deviation. Minus 4.08%
(Pl. Ex. 20)

PLAINTIFFS' HOUSE PLAN

PLUS / MINUS 4% DEVIATION

EXHIBIT
CASE NO. TYPE
FULL EXHIBIT
MAR 8 197
FOR IDENTIFICATION
U. S. DISTRICT COURT
DISTRICT OF CONN

Range of Deviation:

High - Plus 4.02% or 808 people

Low - Minus 4.08% or 820 people

Total Deviation - 8.10%

Ratio of largest district to smallest district: 1.085

Range %	Number of Districts	% of
0 - 1 (inc.)	44	29.3
1 - 2	31	20.7
2 - 3	37	24.7
3 - 4	37	24.7
4 - 4.08	2	1.3

(Cumulative Frequency)

Less than or equal to	1	44	29.3
Less than or equal to	2	75	49.9
Less than or equal to	3	112	74.7
Less than or equal to	4	149	98.6

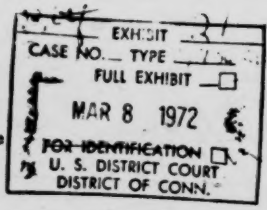
Number of towns cut: 36

Number of segments: 49

Plaintiffs' House Plan. Maximum Deviation. Minus 5.97%.
(Pl. Ex. 21)

PLAINTIFFS' HOUSE PLAN

PLUS / MINUS 6% DEVIATION



Range of Deviation:

High - Plus 5.88% or 1180 people

Low - Minus 5.97% or 1199 people

Total Deviation - 11.85%

Ratio of largest district to smallest district: 1.13

	Range %	Number of Districts	% of Total
	0 - 1	31	20.53%
	1 - 2	27	17.88%
	2 - 3	24	15.89%
	3 - 4	33	21.85%
	4 - 5	23	15.23%
	5 - 6	13	8.61%
(Cumulative Frequency)			
Less than or equal to	1	31	20.53%
Less than or equal to	2	58	38.41%
Less than or equal to	3	82	54.30%
Less than or equal to	4	115	76.16%
Less than or equal to	5	138	91.39%
Less than or equal to	6	151	100.00%

Number of towns cut: 31

Number of segments: 39

Plaintiffs' House Plan, Maximum Deviation, Plus 7.43%
(Pl. Ex. 22)

PLAINTIFFS' HOUSE PLAN

PLUS / MINUS 7.5% DEVIATION

Range of Deviation:

High - Plus 7.43% or 1492 people

Low - Minus 7.32% or 1470 people

Total Deviation - 14.75%

Ratio of largest district to smallest district: 1.16

Range %	Number of Districts	% of %
0 - 1 (inc.)	23	15.2
1 - 2	21	13.9
2 - 3	23	15.2
3 - 4	35	23.2
4 - 5	19	12.6
5 - 6	16	10.6
6 - 7	7	4.6
7 - 7.5	7	4.6

(Cumulative Frequency)			
Less than or equal to	1	23	15.2
Less than or equal to	2	44	29.1
Less than or equal to	3	67	44.4
Less than or equal to	4	102	67.5
Less than or equal to	5	121	80.1
Less than or equal to	6	137	90.7
Less than or equal to	7	144	95.3
Less than or equal to	7.43	151	100.0

Number of towns cut: 27

Number of segments: 35

Plaintiffs' House Plan, Maximum Deviation, Plus 1.60%
(Pl. Ex. 23)

PLAINTIFFS' HOUSE PLAN

PLUS / MINUS 1% DEVIATION

Range of Deviation:

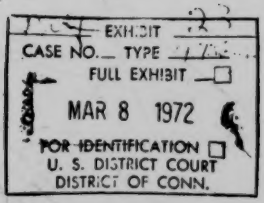
High - Plus 1.60% or 321 people

Low - Minus 1.01% or 203 people

Total Deviation - 2.61%

Ratio of largest district to smallest district: 1.026

Range %	Number of Districts	% of Total
0 - 0.50 (inc.)	58	38.41%
0.50 - 1	89	58.94%
1 - 1.6	4	2.65%



District Court Trial Transcript (Extract)

[Caption Omitted]

[3] Judge Smith: Cummings against Meskill.

Mr. Wade: That's ready, your Honor.

I believe that the first order of business is a motion to stay or dismiss that has been filed by Intervener Gaffney and I wonder if the Court wants to take up that matter at the outset?

Judge Smith: We won't hear the motion first. We will take the evidence and take into consideration both the motion and arguments on the merits at the same time.

Mr. McCarthy: May I, on behalf of the defendant intervener J. Brian Gaffney, respectfully enter a technical objection, your Honor.

I believe the motion on abstention appropriately ought to be heard initially as a matter of comity, form and judicial economy. Thank you.

Judge Smith: Your objection is noted.

Mr. Wade: My brother, Mr. Satter, has not arrived as yet, your Honor. I'm not really sure where he is.

The last I knew he was going to be here this morning. I anticipated the opening of the case that I'd be prepared to go forward on the motion to stay. And I must confess to the Court that Mr. Satter has the entire file to present the evidence [4] with him.

Judge Blumenfeld: That won't handicap you, will it, Mr. Wade?

Mr. Wade: It hasn't usually, your Honor. I've been able to move in a few cases without files before. But I do think he has with him all of the maps and documents that have to be entered.

I wonder if I might be able to telephone his office to see what the possible problem is?

Judge Smith: You may.

Mr. Wade: Thank you, your Honor.

(Pause)

Mr. Satter: Your Honor, may I apologize. I'm sorry.

[5] **Leo Parskey,**

called as a witness, being first duly sworn, was examined, and testified as follows:

The Clerk: Will you state your name, please.

The Witness: Leo Parskey.

The Clerk: And where are you from?

The Witness: Bloomfield, Connecticut.

Direct Examination

By Mr. Satter:

Q. Mr. Parskey, were you a member of the Board, the Reapportionment Board which created the so-called Board Plan? A. Yes.

Mr. Satter: Your Honor, may I submit that as an exhibit now. I don't think the Board Plan has been submitted as an exhibit. I think maybe we ought to put it in as an exhibit; Plaintiffs' Exhibit 1.

Judge Blumenfeld: You mean this?

Mr. Satter: Yes. I think it should be identified in the description of the Plan, itself.

Judge Blumenfeld: I'm willing to sacrifice mine for the purpose of an exhibit.

Mr. Satter: May I just look at it for a minute.

By Mr. Satter:

Q. Mr. Parskey, is this the Board Plan as adopted? A. Yes.

Mr. Satter: May we have the Board Plan, itself, [6] and the maps, which is part of it, marked Plaintiffs' Exhibit 1?

Judge Smith: Mark it Plaintiffs' Exhibit 1.

Mr. Satter: There's no objection, I take it.

(Plaintiff's Exhibit 1: Board Plan and maps, marked full exhibit.)

By Mr. Satter:

Q. Mr. Parskey, were you chosen as a member of this Reapportionment Board by the Speaker of the House of Representatives? A. Yes.

Q. And are you presently a Judge of the Superior Court? A. Yes.

Judge Smith: Isn't this all in the stipulation, or is it?

Mr. Satter: I'm not too sure.

Mr. Wade: No.

Mr. Satter: I'm not sure that it is.

Mr. McCarthy: I believe it is.

Mr. Satter: I'll try to keep it down.

By Mr. Satter:

Q. Now, in the first meetings among the members of the Board, were the general principles and the basis of which you were to reapportion the House and the Senate discussed? A. There were some discussions, yes.

[7] Q. And was there a discussion as to the United States constitutional requirements? A. Yes.

Q. Was there discussion as to what the Board would adopt as the maximum percentage deviation as to both the Senate and the House? A. We had no such discussion as a Board.

Q. Well, did you have a general operating principle that was to be adopted with respect to the deviation principle, the per cent deviation to be used for Senate and House? A. Well, that's a pretty hard question to answer, if you're asking me whether or not the Board came to any conclusions about that in the initial stages.

My impression was that Judge Saden had an operating principle, in both the Senate and the House, as far as deviation was concerned, yes, and stated it.

Q. And what was it? A. In the Senate, 1 per cent; and in the House 4 per cent.

Q. Was there a recognition by the oBard that— withdraw that.

Did the Board recognize that the constitutional requirements, federal constitutional requirements of the Equal Protection Clause required that there be a very low percentage?

Mr. McCarthy: Objection, your Honor. Conclusory.

[8] Judge Smith: It appears to be immaterial.

The objection is sustained.

By Mr. Satter:

Q. Was there an awareness by the Board as to a fundamental conflict between the federal constitutional requirements and the state constitutional provision prohibiting the dividing of town lines? A. Yes.

Mr. McCarthy: If your Honors please, let me state at this juncture a fundamental objection to the consideration here of the state constitutional requirement of town integrity in the formation of house districts.

Consistent with our first defense of abstention, or at least continuance pending state court proceedings on primarily the state court point under Scott vs. Germano, I think this subject matter is, if not irrelevant, at least immaterial here.

I think the issue before this Court is the mathematics of Reynolds vs. Sims and its successive federal equal population per electoral district cases.

Judge Smith: The objection is overruled.

Mr. Satter: Would you repeat the last question, please?

[9] By Mr. Satter:

(Question and answer read back.)

Q. Did the Board, in these early discussions, arrive at an operating principle as to how it would deal with that conflict? A. Well, the only discussion as a Board indicated that it was our feeling at the beginning that town lines would have to be cut in order to comply with the require-

ments of the federal constitution. Beyond that, I don't recall any discussion by the Board of an operating principle. However, I have impressions as to what the operating principles were.

Q. And what were they? A. That once the town lines were cut at all, that from then on they could be cut without an examination of the Connecticut Constitution.

You see, you asked me a question about what the Board did and what happened. Actually, at the early stages we didn't examine these propositions one by one and make a decision as a Board. After some early discussions what happened was that Judge Saden worked by himself and I worked by myself, and the only impressions I can give you is my impressions as to what I felt Judge Saden's view was on this.

Now, in the course of time the three of us did get together on occasion and had further discussions. But when you speak of it as a Board, it's hard to answer that question [10] in precisely that fashion.

Q. Was there a fundamental operating working principle, even if it hadn't been discussed, on the basis of how you dealt with the cutting of town lines in order to comply with the federal constitutional requirements? A. Well, yes. The impression that I had was that the operating principle was that once the town lines were cut, that from then on it didn't make any difference.

Q. It didn't make any difference how many times they were cut? A. That's right.

Mr. Satter. No further questions.

Mr. Beizer: As intervening plaintiffs, might I ask one or two questions of Mr. Parskey?

Judge Smith: You may.

Cross-Examination

By Mr. Beizer:

Q. Just two questions, Mr. Parskey. First, prior to ascending to the Bench in the Superior Court for the State

of Connecticut, were you counsel to the Democratic Party in the State of Connecticut?

Mr. McCarthy: Objection, your Honor.

If I may, it is once again a fundamental principle, of course, of this hearing that elements of political involvement are not justiciable under [11] the cases cited in my brief.

That apart from elements of racial consideration from Colegrove vs. Green to Whitcomb vs. Chavis, most recently, our Supreme Court forebears the entertainment of political elements in any reapportionment plan, recognizing that the same is inherently political of necessity.

Mr. Cannon: May it please the Court, I would join in the objection as immaterial and irrelevant to the issues in the case, prior to being appointed to the Board, as not relevant to the issue.

Judge Smith: The objection is overruled.

A. What is the question, whether I was counsel to the Democratic Party before I was appointed to the bench?

Q. Yes. A. The answer is yes.

Q. And also for some years prior to ascending to the bench were you identified with and did you work with the Democratic Party? A. Yes.

Mr. Beizer: No further questions.

Mr. Cannon: No questions.

Cross-Examination

By Mr. McCarthy:

Q. Judge Parskey, in your consideration of elements of [12] reapportionment planning as a member of the Board, did you bring to your deliberations any statistical background? A. You mean what-

Q. Perhaps it may be helpful if I amplify the question.

Did you present to the other members of the Board any statistics with respect to plans of reapportionment? A. Oh, yes, we discussed that.

Q. Did you have any exhibits, statistical analysis, with respect to population, town lines, deviations from arbitrarily assumed perfection in the division of population into electoral districts? A. We had an array of statistics that were presented and I had statistics as Judge Saden had, yes.

Q. Do you recall the source of your statistics, Judge Parskey? A. Well, we had, I suppose it was, a combination of things; we had the statistics on population, we had statistics on election returns, we had general experience.

Q. More specifically, Judge, from whom, by name, if you recall, did you obtain such statistics? A. Well, I had my own and I did have two people working with me as part of the staff; Mr. Tom Vocelli and Miss Karen Weiss.

Q. Do you have any of your source data readily at hand, Judge? [13] A. No, I didn't bring anything here.

Q. Could it be made available at need? A. Yes, whatever I have. I think I have some of that at home. Surely.

Q. I would appreciate it if you could make it available for our review. A. Certainly.

Mr. Cannon: Well, may I address the Court?

I would object to the statistics that they worked with as the final Plan that's before the Court and whether or not that is constitutional as it now stands.

Judge Smith: They haven't been offered. He has been asked if he could make them available.

Mr. Cannon: I realize that, your Honor.

Judge Smith: If he wishes to introduce them, that would be another question.

But as far as the question goes, we will allow it up to this point.

By Mr. McCarthy:

Q. Did you or your associates, Mr. Vocelli or Mrs. Weiss, develop alternative plans for the Senate? A. Yes.

Q. Do you have those plans at hand, Judge? A. I'm not quite sure. I would have to check back.

[14] Q. I would appreciate it if you could do so. A. Yes. Because it seems to me, as I recall it, there was one plan that I thought was left with Judge Thim. Now, whether or not there were any copies of those and whether I have any of those copies or whether those copies are with Mr. Vocelli or Miss Weiss, I'm not sure.

Judge Blumenfeld: Isn't this all a matter for pre-trial discovery rather than court inquiry, Mr. McCarthy? Can't we get on with the case here?

By Mr. McCarthy:

Q. May I inquire, then, whether you have any such plans with respect to the House, Judge Parskey? A. Yes. There was a plan—it was a very general plan. There wasn't a detailed plan. It was a plan that was given to Judge Saden that was in block areas, without a breakdown. Other than that, I didn't have any.

Q. Do you recall the deviations of those plans? A. Specifically, no, I don't. The impression is, it seems to me that the House plan, there was one that was within five per cent. I thought there was another within four per cent.

Q. In your discussion of basic principles in the composition of a plan of reapportionment with the other members of the Board, do you recall discussions of maintenance of contiguity or assignment of population? [15] A. I don't understand the question.

Q. In your basic consideration of guiding principles which would fashion your development of plans, you have spoken with respect to town lines. I'm curious whether you also considered the input of elements of maintenance of contiguity in the formation of House districts? And if I may double the question, assignment of population to each and every district? A. Well, the only discussion I recall in connection with that is in the discussion of the Plan that was ultimately adopted by the majority.

I know that I raised very serious objections to the manner in which the various towns were cut. They were cut in all sorts of different ways. And that was raised.

I raised similar objections to certain cuts that were made in the Senate plan.

Q. What was the basis of your objections, Judge? A. Well, there didn't seem to me to be any particular need for promiscuous cutting. It made no sense, from a population point of view, to have these cuts made. So that if the only criterion was to keep within the 1 per cent or the 4 per cent, it wasn't necessary to do that for the purposes of these cuts.

Q. Do you recall those population percentage figures of which you have spoken, 1 per cent for the Senate and 4 [16] per cent for the House, as specific desiderata; or to put the question conversely, was it possibly the understanding of the Board to reduce these deviations as much as possible? A. As I recall, the Board never acted on that as a proposition. We never sat down and said that we shall keep within 1 per cent or we shall keep within 4 per cent. The figures that I gave you were figures that were selected by Judge Saden.

Q. Was it your basic and guiding intent, Judge Parskey, in the composition of electoral districts for both Senate and House to use all the population in the state? A. Well—

Q. Or put it another way, put it conversely; you didn't intend to leave out any of the total state population, did you? A. Oh, no.

Mr. McCarthy: No further questions. Thank you.

Judge Blumenfeld: Are you through with this witness?

Mr. McCarthy: I am, your Honor. Thank you.

Judge Blumenfeld: May I ask him a question before he leaves.

Judge, who decided that there should be 151 Representatives? Whose decision was that?

The Witness: I would say that was a Board de- [17] cision.

Judge Blumenfeld: The Board decided that.

The Witness: I think that what brought it about was that the Commission that was—there's a three step process under the state constitution. The Legislature is first, then the Commission and then the Board. And the final Commission plan, which we had and which we examined, was for 151 members in the House. And we accepted that.

Judge Blumenfeld: So it originated there, so far as you know?

The Witness: Yes.

Judge Smith: That was a plan not adopted by the Commission in such form that it could become final, but was it the plan of the majority of the Commission?

The Witness: It was listed as a final draft. I don't believe that it had actually been approved, as such, by the requisite vote. But it was listed and marked as a final draft. We had it before us.

Judge Blumenfeld: Then so far as you know the first authoritative determination was that made by the Board?

The Witness: Yes.

Judge Blumenfeld: There was no discussion at [18] all about that. You just accepted that?

The Witness: Yes.

Judge Smith: Mr. Satter?

Mr. Satter: That's all. Thank you, Judge.

Mr. McCarthy: May I add one further question, your Honor?

Judge Smith: You may.

Mr. McCarthy: Thank you, your Honor.

By Mr. McCarthy:

Q. With respect to the issue of cutting town lines, I show you an exhibit for identification captioned "Final Commission Draft" and ask you if you recognize it? A. Well, I don't recognize in this form. I have no reason to

say that this isn't what we had. But what we actually had was a very, very large map that was so designated. And unless I had that before me and could compare that with this, you know, just on a quick glance I really can't say.

I can see similarities in some areas to what I know was there. And this could very well be a copy of the Final Commission Draft of the Senate. But if you ask me is this the Final Commission Draft, it was not in a form of this. It wasn't even in this size. So this isn't the Xerox copy of the actual document. The actual document was much larger.

Mr. McCarthy: Thank you.

I will ask to have it marked for identification [19] if your Honors please.

Judge Smith: Defendants' A for Identification.

Mr. Satter: No objection.

(Defendants' Exhibit A for Identification: Final Commission Draft.)

By Mr. McCarthy:

Q. Leaving this with you as an exhibit simply for identification and not for evidence, Judge Parskey, may I ask you whether as the Plan is depicted before you with respect to the composition of Senate districts, whether you recognize that it cuts town lines? A. Yes. Incidentally, there's nothing in the Connecticut Constitution about cutting town lines as far as senatorial districts were concerned. And there was no question but what this Plan cuts town lines.

Judge Blumenfeld: You are talking about something not in evidence.

Do counsel for the plaintiffs agree that this is a copy of the Commission's plan?

Mr. Satter: I can't either agree or disagree. I have no way of knowing.

Mr. McCarthy: That's all. Thank you, your Honor.

Judge Blumenfeld: You are excused.

(Witness excused.)

[20] **Leo Donohue,**

called as a witness, being first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Leo Donohue, Avon.

Direct Examination

By Mr. Satter:

Q. Mr. Donohue, what is your present position in state government? A. State Auditor of Public Accounts.

Q. And what other positions have you held in the government of the State of Connecticut? A. I have been Commissioner of Finance and Control, Deputy Commissioner of Finance and civil servant in several departments, including the Budget Division of the Department of Finance.

Q. And are you familiar with the financial relationships between the State of Connecticut and the various towns throughout the state? A. Yes.

Q. And are you aware that—withdraw the question.

Do towns in the State of Connecticut perform certain state functions as agents of the state? A. Well, yes. I'm not an attorney, but there is a court case that has determined that local Boards of Education are agents of the state.

But in addition to that, there are provisions in the [21] statutes under which state agencies may contract with municipalities so that municipalities may perform services for the state.

Q. And what kinds of functions, for example, either on a contractual basis, do towns perform for the state? A. Well, one that readily comes to mind is the maintenance of a road. For the convenience of the municipality and the state the state can contract with the municipality to maintain a certain area of state road that it might be inconvenient for the state to maintain.

Q. Are there any other functions, such as the administration of Welfare, et cetera? A. Yes. The Town of

Greenwich, I think, is the only town in the state, the only one I can think of at the moment that administers the Welfare program for the state and the state reimburses Greenwich for that.

Judge Blumenfeld: Don't all towns make available welfare in emergency cases and get reimbursement from the state?

The Witness: Yes, your Honor. But I understood the question to be a state function under the statutes performed by the town. I think that's a little different.

Judge Blumenfeld: How does this work? If the City of Hartford or Waterbury makes available emer- [22] gency welfare assistance and gets reimbursed by the state, is that a separate contract in each case?

The Witness: No, it isn't. That's a function of the city, of the municipality, until the person becomes eligible for state assistance.

Judge Blumenfeld: Right. That's a function. But are they reimbursed by the state?

The Witness: Yes, your Honor.

Judge Blumenfeld: And that occurs by reason of the statute?

The Witness: Yes.

Judge Blumenfeld: All right.

By Mr. Satter:

Q. Were there any other kinds of similar financial arrangements between the State of Connecticut and the various towns in which towns render services which are reimbursed by the state? A. Oh, yes, there are many. Particularly in the education area, where state statutes require towns to perform, carry out certain educational programs or permit them to carry out educational programs for which the state will reimburse on a percentage or cost-sharing basis.

Q. How about in the area of health, for example? A. Yes, there are in the area of health, in almost [23] every broad program area.

Q. That is, in almost every broad program area there are situations and instances where the towns perform functions for which they receive reimbursement from the state? A. Yes.

Q. Now, did you prepare at our request a list of state aid grants by the state to the towns for various purposes? A. Yes, I did.

Q. And is this that list that you prepared? A. Yes, that's the list.

Q. Would you just glance at it and just briefly summarize some of the kinds of grants that are made by the state to municipalities? A. Under two broad categories of grants; first, those in which the state pays an amount by statute regardless of whether the town performs any service—in other words, not in reimbursement of town expenditures; and then there are those in which the state reimburses a share of town expenditures.

In the first instance, the first group, there are Highway Town Aid and there are Education grants where we pay a per pupil—the state pays a per pupil cost every year.

Then there are programs for disadvantaged children under which the state distributes based on a formula. There are property tax relief grants that are called Block Grants [24] based on population formula and—

Judge Blumenfeld: As long as this is an exhibit, why does the witness have to read all this into the record?

Mr. Satter: I just wanted to have some explanation.

All right. May I submit this as an exhibit.

Mr. McCarthy: I will make the running technical objection, your Honor, to the exhibit as well as to the basic testimony in the sense that the relevancy of town line cuts is primarily for the consideration of state courts.

But I forebear the continuing objections under our federal rules and I am quite happy, really, to stipulate the entirety of what this witness is offering because I regard it as essentially irrelevant.

Judge Blumenfeld: Is there any objection to this tendered exhibit?

Mr. McCarthy: The same technical objection as before.

Judge Smith: Overruled. Plaintiffs' Exhibit 2.

(Plaintiffs' Exhibit 2: List of State Aid Grants, marked full exhibit.)

Judge Blumenfeld: Is there anything else of this witness, Mr. Satter?

[25] Mr. Satter: No. I just want to get this exhibit.

Mr. Beizer: I have no questions.

Mr. McCarthy: No questions.

Judge Blumenfeld: You are excused, Mr. Donohue.

(Witness excused.)

[26] **Richard W. Lafferty,**

called as a witness, being first duly sworn, was examined, and testified as follows:

The Clerk: State your name.

The Witness: Richard W. Lafferty.

The Clerk: And where do you live?

The Witness: 11 Sunrise Terrace, Simsbury, Connecticut.

Direct Examination

By Mr. Satter:

Q. Mr. Lafferty, where are you employed? A. I'm employed by the Connecticut Public Expenditure Council in Hartford.

Q. And have you been involved in the study of town government in this state? A. Yes, I have. As part of my duties at the Council I'm the Director of the Municipal Consulting Service and part of my responsibilities are to examine local government in Connecticut.

Q. Just briefly describe what the role and function of the Connecticut Public Expenditures Council is with respect to

state and town government? A. We're a privately-financed government research agency founded in 1942 and we have two specific areas of interest: generally state government research and municipal consulting.

[27] My capacity with the Council is Director of their Municipal Consulting Service and, in summary statement, the Council is interested in efficient responsive local and state government. We conduct research pursuant to these goals.

Q. Now, have you determined how many towns there are in the State of Connecticut with a Town Meeting form of government? A. Right now there are 101 towns in the state out of 172 towns and cities that have what we describe as the open town meeting. This is the general town meeting where the town meeting, under the state statutes, functions as the legislative body.

In addition to that, there are 7 towns in the state that have what is described as a Representative Town Meeting, functioning as the legislative body in the towns.

Also we have 28 towns in the state where the town meeting still exists, but in a limited capacity. In other words, its responsibility legislatively is enumerated in certain and limited to certain specific areas.

Q. And when there is an Open Town Meeting form of government what does that mean in terms of the citizen's participation in town affairs? A. Okay. The Open Town Meeting functions as the legislative body and convenes at least twice a year under the [28] statutes; once for the annual adoption of the budget and a second time for what they call consideration of any items that might properly be brought before the town meeting.

Eligibility at the town meeting covers all voters and all citizens, residents of the town and non-residents who happen to own at least $1,000 worth of property on the grand list. So it's open to all voters and the citizens that I've just described.

Q. And what is the role and function of citizens, residents of the town under a Limited Town Meeting form of government? A. Well, basically it's the same role and function, only the areas that are considered to be the responsibility of the town meeting are limited to certain specific responsibilities; such as the adoption of the annual budget, the purchase and sale of real estate, the approval of bond issues. And these are enumerated in the local charter.

Q. And what is the role and function of citizens of a town under a Representative Town Meeting form of government? A. In the Representative Town Meeting the voters elect representatives to basically sit in their town meeting. It is not an open town meeting where all voters and other citizens can come and voice their opinions, and so forth, and vote.

In this case you have a specific number of representatives who are elected by the balance of the voters to [29] represent them are what we call a Representative Town Meeting. So it's a representative body of the voters.

Q. Do you have a list of towns, not a total list but a specific list of towns which have the Open Town Meeting form of government with you? A. I did not bring it with me, Mr. Satter. I'm sorry.

Q. All right. May I ask you, then, whether or not the following towns have an Open Town Meeting form of government: Burlington, Haddam, North Haven and Redding? A. Yes,they do.

Q. And do the following towns have a Representative Town Meeting form of government: Fairfield, Groton and Westport? A. Yes.

I'd just like to comment on the Groton situation, if I may. They have a Representative Town Meeting in the Town of Groton. They also have a Town Council. It's the only situation in the state where we have a bicameral legislative body on the local level.

Q. And do the following towns have a Limited Town Meeting form of government: Bloomfield, Granby, Kill-

ingly, Ledyard, Montville, Vernon, Watertown and Windsor? A. Yes. They all have Limited Town Meeting.

Q. Now, even in towns which do not have a Town Meeting form of government, as you have described it, but have a mayor [30] or a council and city manager form of government, do citizens operate politically in the affairs of that town? A. Yes, I would say they do. An example of this would be the mechanism of initiative and overrule that is built into many city and town charters where there is no town meeting in any form, limited or otherwise. And this gives an opportunity to the voters to petition for either the initiation of an ordinance or the overrule of an action of a town council upon the submission of X per cent of the voters, which would carry right to townwide referendum. So there is a direct participation, even in the absence in most cases of any form of the town meeting.

Q. And how about town referenda on such issues as bond issues? A. Many town charters do stipulate that any bond issue in excess of a given amount, such as $250,000 or $500,000, must automatically go to townwide referendum. This is the case in Hartford, West Hartford and many other towns.

Q. These are towns not with any kind of Town Meeting form of government, but towns which even have a mayor or town council and city manager form of government? A. That's correct. In those two cases that I cited there's no semblance of a town meeting.

Q. And then even apart from the instances of citizen participation, of course, citizens vote in towns for local [31] town councils and for mayors and for boards of education, et cetera? A. That's correct.

Mr. Satter: No other questions.

Mr. Beizer: No questions.

Mr. McCarthy: No questions.

Mr. Cannon: No questions.

Judge Blumenfeld: You are excused, Mr. Lafferty.

(Witness excused.)

[32] **Thomas Vocelli,**

called as a witness, being first duly sworn, was examined, and testified as follows:

The Clerk: State your name.

The Witness: Thomas Vocelli, 144 Carmalt Road, Hamden, Connecticut.

Judge Blumenfeld: How do you spell your last name?

The Witness: V-o-c-e-l-l-i.

Judge Blumenfeld: Are you an official of some sort?

The Witness: For more than a year, your Honor, I've worked on reapportionment material and census data pertaining thereto.

Mr. McCarthy: Could we hear that again?

The Witness: For more than a year I have worked on various aspects of the reapportionment problem and the various census data and maps that pertain to it.

First I worked for the Reapportionment Committee of the State Legislature, and following that for the Special Commission already alluded to, and then with various members of the Board. And more recently I've been working with the plaintiffs.

Judge Blumenfeld: When you worked for these [33] official bodies, who paid you?

The Witness: Generally speaking, for the most part it was the state legislature because I was originally hired as a staff worker of the Reapportionment Committee of the State Legislature.

Later there were other financing mechanisms. But for most of our pay it has been the state legislature.

Direct Examination

By Mr. Satter:

Q. In your capacity of working for the LegislativeReapportionment Committee of the State Legislature did you become familiar with the 1970 census data? A. Yes, I did.

Q. Did you also become familiar with the population—

well, with the votes—let me withdraw that and start the question again.

Did you also become familiar with this census data in terms of individual towns throughout the state? A. Yes, I did.

Q. And you worked with this data with the Legislative Reapportionment Committee during the 1971 session of the Legislature? A. Yes, that's correct.

[34] Q. And helped to develop plans for the Legislative Reapportionment Committee? A. Yes. It was really a number of things; developing plans, making different analyses based on the census data, making different cuts of various towns where they had to be cut. Just working up various suggestions. Also an awful lot of map work in terms of transferring the census data from the census maps to a more manageable form.

Q. And when the 1971 legislative—withdraw the question.

When the Legislative Reapportionment Committee, that is, the Reapportionment Committee consisting of state legislators, such legislators ceased to function and an eight man Commission was appointed, did you also work with that eight man Reapportionment Commission? A. Yes, I continued on as a staff worker for it.

Q. And when that ceased to function, that is, when the constitutional deadlines passed, did you also work with the Reapportionment Board? A. Yes, I did.

Q. And in all those capacities you performed essentially the same function of working with the census data? A. That's correct.

Q. Of applying it to the various towns and of helping to create plans in accordance with specifications as established [35] by members of those various legislative committees commissions or boards? A. That's correct.

Q. First, I show you a map which purports to be the Board House Plan, 151 districts, and ask you whether that map is a fair representation of the Board Plan with respect

to the House of Representatives? A. Yes, I would say it is. It's a good approximation.

Mr. Satter: May I introduce this in evidence.

Mr. Beizer: No objection.

Mr. McCarthy: No objection.

Mr. Satter: I don't believe this has been introduced. You see, the reapportionment Plan itself does not have a map which enables you to see what it looks like.

The Court: That is Exhibit 3.

(Plaintiffs' Exhibit 3: Map for House, marked full exhibit.)

By Mr. Satter:

Q. Likewise, I show you a map of the State of Connecticut which is entitled, "Board Senate Plan, 36 Districts" and ask you whether or not this map is a fair depicture of the shape of the senatorial districts under the Board's set of plans. A. Yes, I would say it is.

[36] Mr. Satter: Is there any objection?

Mr. Beizer: No objection.

Mr. Cannon: No objection.

Judge Smith: Plaintiffs' Exhibit 4.

(Plaintiffs' Exhibit 4: Map for Senate marked full exhibit.)

By Mr. Satter:

Q. Mr. Vocelli, I show you a map of the State of Connecticut, on which is outlined Assembly Districts No. 50, 51 and 52, which was submitted as Plaintiffs' Exhibit A in the Saden deposition and I ask you whether or not that map delineating those particular Assembly districts is a fair representation of those Assembly districts on the Board Plan? A. Yes, that is.

Judge Blumenfeld: Are there many of these to be offered, Mr. Satter?

Mr. Satter: Yes, there are.

Judge Blumenfeld: Well, make them all available to counsel who will have to pass on them at one time so that we won't have to—

Mr. Satter: Excuse me.

May I ask counsel, then, that all the exhibits I'm about to introduce are exhibits which were introduced in the Saden deposition and if nobody has any objection I can just do it very quickly.

[37] Mr. Cannon: No objection.

Mr. McCarthy: No. If these are identical with those we saw during the depositions of Judge Saden and Mr. James Collins, they are perfectly agreeable to us as exhibits; reserving, of course, objections to their evidential relevancy.

Mr. Satter: Well, I might just tell you, Mr. McCarthy, that in each instance the exhibit has the sticker of the state of the Reporter for that deposition.

Mr. McCarthy: Fine.

Judge Blumenfeld: Do you want to identify them for the record as you introduced them now, Mr. Satter?

Mr. Satter: Well, for each one I have to get some evidence respecting it. I'm not only just dumping them on your desk at the moment. I want to elicit some evidence.

Judge Blumenfeld: Which one do you want to elicit evidence about now?

Mr. Satter: Right now, the most recent one that was admitted.

Judge Blumenfeld: It hasn't yet been admitted.

Judge Smith: Plaintiff's Exhibit 5; 50, 51 and 52.

[38] (Plaintiffs' Exhibit 5: Board House Plan, Assembly Districts 50, 51 and 52, marked full exhibit.)

By Mr. Satter:

Q. Mr. Vocelli, Plaintiffs' Exhibit 5 shows that the Town of Killingly in the northeast part of the state has been cut in the formation of Assembly Districts 50 and 51, isn't that correct? A. Yes, that's right.

Q. Now, did you prepare another plan encompassing the same area of the State as in Plaintiffs' Exhibit 5, redesign-

ing Assembly Districts 50, 51 and 52 so as to avoid cutting the Town of Killingly? A. Yes, I did prepare such a—

Mr. McCarthy: If your Honors please, we shall object to the introduction of alternative plans until or unless the constitutionality of the Board Plan may be determined. The availability of alternative plans I do not believe is presently issuable.

Judge Smith: Objection overruled.

Judge Blumenfeld: Has that alternative been made an exhibit?

Mr. Satter: Now it will be.

Judge Smith: No. 6.

Mr. Satter: If you want to make it 5-A, it [39] might link them both together.

Judge Smith: 5-A.

(Plaintiffs' Exhibit 5-A: Alternate Plan, marked full exhibit.)

By Mr. Satter:

Q. Now, in Plaintiffs' Exhibit 5-A, which depicts a redesign of Assembly Districts 50, 51 and 52, is the deviation, the percentage deviation of population in each of these new districts redesigned within the deviation of the Board Plan? A. Yes, it is. It's within the outer limits or the outer deviations of the Board Plan. In other words, it has basically the same types of population deviations as the Board Plan.

Q. And it covers exactly the same area of the state in each instance? A. That's correct.

Q. And Plaintiffs' Exhibit 5-A avoids the cut of the Town of Killingly? A. That's correct.

Judge Blumenfeld: I'm not sure I got this correctly. Is 5-A a description of three districts: 50, 51 and 52?

Mr. Satter: Yes.

Judge Blumenfeld: And does 5 embrace three [40] districts also?

Mr. Satter: Yes, your Honor.

Judge Blumenfeld: The same three?

Mr. Satter: The same three exactly.

Judge Smith: And the same area exactly, the same overall area?

Mr. Satter: Exactly. Within the same parameter of the state. We haven't changed any other part of the state in order to accomplish that purpose.

Judge Smith: You switched within the area?

Mr. Satter: We switched within the area to avoid a town cut of Killingly. Exactly.

By Mr. Satter:

Q. Mr. Vocelli, I show you a map depicting Assembly Districts 64, 65, 67, 68 and 69, and ask you whether this is a fair reproduction of those districts, those numbered assembly districts on the Board Plan?

For purposes of identification for counsel, it is Plaintiffs' Exhibit B in the Saden deposition.

Mr. McCarthy: No objection.

Judge Smith: No. 6.

A. Yes, this is a fair approximation of the Board Plan of these areas.

(Plaintiffs' Exhibit 6: Board House Plan, [41] Assembly Districts 64, 65, 67, 68 and 69, marked full exhibit.)

By Mr. Satter:

Q. Now, in Plaintiffs' Exhibit 6 does it reveal that in the construction or design of Assembly Districts 68 and 69 the Town of Watertown is cut? A. Yes, it has been cut or it was cut by the Board Plan.

Q. Now, did you prepare an alternative plan of these same numbered districts in which the Town of Watertown was not cut? A. Yes, I did.

Q. Is this the map of that redesign of those numbered districts? A. Yes, that's the map.

Q. And does it encompass exactly the same geographic area as encompassed in Plaintiffs' Exhibit 6? A. Yes, it does. Just by shifting around within that area outlined in red one avoids cutting Watertown.

Mr. Satter: I will offer this in evidence.

Judge Smith: 6-A.

(Plaintiffs' Exhibit 6-A: Alternate Plan, marked full exhibit.)

By Mr. Satter:

Q. And in your alternative, Plaintiffs' Exhibit 6-A, did you avoid cutting the Town of Watertown? [42] A. Yes, I did.

Q. And in the redesign of the numbered districts did you keep within the same percentage deviation as in the Board plan? A. Yes, I did.

Q. Now, Mr. Vocelli, I show you a map outlining Assembly Districts 37, 48 and 45 of the Board plan. Is this a fair depicture of the shape of those districts on that Board plan? A. Yes. That's a very good approximation.

Mr. Satter: I offer it.

Judge Smith: 7.

(Plaintiffs' Exhibit 7: Board Plan, Assembly Districts 37, 48 and 45, marked full exhibit.)

By Mr. Satter:

Q. And in the Board plan was the Town of Montville cut twice? A. Well, in the Board plan the Town of Montville was divided into three different segments or divided among three different assembly districts.

Q. Among three different assembly districts? A. That's correct.

Q. Now, were you able to redesign a plan with respect to the same numbered assembly districts in which you could avoid cutting the Town of Montville and putting it into only [43] two assembly districts? A. Yes, I was. You can reduce the number of segments, so to speak, from three to two.

Q. From three to two. And is this what is described as the alternative plan, how you accomplished that? A. Yes, it is. In other words, most of Montville, the large part of

Montville is now in one assembly district and just a small piece in another, rather than dividing it into three segments as the Board Plan did. That's correct.

Q. And in this recreation of the same land area, geographic area, and the redesign of these two assembly districts, did you keep within the same percentage deviations as the Plan? A. Yes, I did.

(Plaintiffs' Exhibit 7-A: Alternate plan, marked full exhibit.)

Mr. Wade: With the Courts' permission, may we put the podium down on the floor to have some room here for these maps?

Judge Blumenfeld: Sure.

Mr. Satter: I'm sorry, your Honor. I just have to get a little organized.

(Pause)

By Mr. Satter:

Q. Now, Mr. Vocelli, I show you a design and ask you [44] to describe the assembly districts on this map for the Towns of North Haven and Hamden. A. Well, everything in red is the Assembly District 88. Everything in red involves Assembly District 88 under the Board plan, which involves a piece of North Haven and a piece of Hamden.

Now, there is another Hamden-North Haven district, there's another Hamden-North Haven district involving again a segment of North Haven and a segment of Hamden. And once again you have another segment of Hamden, this massive blue all the way down the town line that is hooked up with southern Cheshire, and in Hamden there is one district under the Board Plan totally under the town. That is in the yellow complex down here.

Q. What is the number of that? A. I believe the district wholly within the town is Assembly District 91.

And the two North Haven-Hamden districts, that is, the two that share are Assembly District 87 and 88.

Mr. Satter: Mr. McCarthy, may I show you something?

Mr. McCarthy: Yes.

Mr. Satter: I want to substitute a certain section of the Saden deposition of this in order to make the map clear, but I want to show it to you be- [45] fore I do so.

Judge Smith: Show it to him.

Mr. Satter: You have to come over here to see how I'm doing it on the easel.

(Off the record discussion.)

Mr. McCarthy: No objection.

Mr. Satter: First, your Honor, I would like to put into evidence this exhibit, which is Saden's Exhibit D and D-1 for Identification.

Judge Smith: Plaintiffs' Exhibit 8.

Judge Blumenfeld: There are two pieces.

Judge Smith: 8 and 8-A.

(Plaintiffs' Exhibit 8 and 8-A: Board Plan for Hamden and North Haven, marked full exhibit.)

By Mr. Satter:

Q. Mr. Vocelli, I show you another map of Assembly Districts 87, 88, 89 and 91 in the Towns of North Haven and Hamden and ask you whether that is a fair depicture of those assembly districts in those towns? A. Yes, it is. It is a fair approximation, a very good one. The district is joined by the Board Plan in those partcular towns.

Q. And is it the same exactly as Plaintiffs' Exhibit 8 for Identification, except that it eliminates some confusing cross-hatching and Senate lines? [46] A. Yes. It's exactly the same, except that it just takes off the Senate material so as to make the assembly districts more clear to one who is looking at it.

Judge Zampano: With your ruler, would you mark 87 and 88?

The Witness: 87 is the white area. Now, that's part of North Haven and part of Hamden.

88 is everything in red, which is again part of North Haven and part of Hamden.

89 includes part of Hamden which you see in blue here, plus southern Cheshire, which would be to the north, of course, of Hamden.

And the only assembly district wholly within Hamden, for that matter the only assembly district totally within those two towns is Assembly District 91, which you see in the Southern portion here in yellow.

By Mr. Satter:

Q. Also for purposes of being able to use this map, is one portion of it, one separate piece of it North Haven and the other piece of it Hamden? A. Yes, that's correct. That way you can separate and consider each town individually or both together.

Mr. Satter: May I then have these marked?

Judge Smith: I think we will make them 8-B and [47] 8-C.

Mr. Satter: All right.

(Plaintiffs' Exhibit 8-B and 8-C: Map of Hamden and North Haven, marked full exhibit.)

By Mr. Satter:

Q. Now, Mr. Vocelli, have you redesigned these same numbered Assembly Districts 87, 88, 91 and a part of 89 in order to reduce the number of—may I withdraw this a moment please.

May I have the previous exhibit. Referring again to Plaintiffs' Exhibit 8-B and C, how many segments or portions of towns have been used in the formation of the assembly districts depicted on this exhibit? A. Well, all told, you would have, by our definition of segments, you would have one, two, three, four, five.

By "segments" we mean a portion of the town used in forming a district not wholly within the town. So you would have the two pieces of segments.

Q. Would you point to your map? A. The two pieces or segments in North Haven each forming part of a district. And you would have one, two, three segments in Hamden, each forming part of a district not wholly within the town.

So what it boils down to is that Hamden has one district, yellow, 91 totally within the town. Then it has three [48] other pieces go every which way to three other districts.

Q. And to two other towns? A. Right.

Q. So the total number of segments then depicted on Plaintiffs' Exhibit 8-B is how many? A. There are five segments, by our definition of segments; yes.

Q. Now, have you redesigned those same districts Assembly Districts 87, 88, 89 and 91? A. Yes, I have.

Q. Within the same land area as the Board Plan? A. That's correct. Just the Towns of Hamden and North Haven.

Q. Is this a fair depicture of that redistricting? A. It is.

Mr. Satter: May I mark that, please.

Judge Smith: 8-D.

(Plaintiffs' Exhibit 8-D: Alternate Plan marked full exhibit.)

By Mr. Satter:

Q. In Plaintiffs' Exhibit 8-D would you show how many segments are thus created? A. Well, in the Towns of Hamden and North Haven we now have only two segments; that is, one portion of Hamden that is using a portion of a district not wholly within Hamden. [49] By the same token, only one portion of North Haven that is also used in forming a district not wholly within the town. Because what we did was create two districts entirely within Hamden and one district entirely within North Haven.

Q. So you reduced the number of segments from— A. Five to two.

Q. From five to two. And was the deviation in this redesign within the limits of the Board Plan? A. Yes, it was.

Q. Mr. Vocelli, I show you an outline of Assembly Districts 19 and 20 in the Town of West Hartford, which for purposes of counsel was submitted in the Saden deposition as Plaintiffs' Exhibit E. Is that a fair depicture of those assembly districts under the Board Plan? A. Yes, it is.

Q. Now, would you just describe which districts is which? A. Well, Assembly District 20 under the Board Plan begins in the southwest—excuse me—the southeastern portion of West Hartford and it moves all the way up in a rather jogging fashion, all the way up to the northwest corner of West Hartford. So it goes from the northwest to the southeast. That's Assembly District 20.

Now, Assembly District 19, also totally within West Hartford, jogs in a very inconsistent fashion. I can't really [50] give any description for it, but it just jogs out with all sorts of, I would say, rather odd movings about.

Mr. McCarthy: Your Honor. Conclusory.

Mr. Satter: Well, your Honor, I think it is a fair description of what is in front of us all.

Judge Smith: Without characterizing it as odd, I will sustain the objection as far as the characterization is concerned.

By Mr. Satter:

Q. And also would you just outline with your pointer Assembly District 18. A. Assembly District 18 is also completely within West Hartford. It's basically the northeast corner. And the balance of West Hartford is in the southern portion down here in the south and southwest. It goes to the Town of Farmington.

Q. There are figures on this map. Would you identify those figures? A. Those are the populations of the Board districts in question based essentially on a reading of the Board Plan and hooking up the census drafts and the census data outlined in the plan for those particular districts.

Then by going to a computerized M.E.D. list, one can

compute the essential population. And they all fall within [51] the normal parameters of the Board Plan populations.

Judge Zampano: And that little wedge is what, part of 21?

The Witness: Right. It's part of Farmington. It's part of the Farmington base district. Therefore it's only about 6,000, a little wedge, hooked up with the 14 some odd thousand people in Farmington.

Mr. Satter: May this be marked, please.

Judge Smith: 9.

(Plaintiffs' Exhibit 9: Map of West Hartford area, marked full exhibit.)

By Mr. Satter:

Q. Now, Mr. Vocelli, I show you a map of a redesign of the same Assembly Districts 18, 19, 20 and 21 in the Town of West Hartford, which for counsel's purposes was Saden's Exhibit E, and ask you whether you prepared this redesign? A. As a matter of fact, I believe my colleague did.

Q. But has it been designed within the same percentage deviations as in the Board Plan? A. Yes, it has.

Q. Each of the districts is within the same percentage deviation? A. Right. In other words, the districts all fall within the general parameters as outlined by the Board Plan; the [52] plus or minus 4 per cent.

Mr. Satter: Let me introduce this into evidence.

Judge Smith: Exhibit 9-A.

(Plaintiffs' Exhibit 9-A: Alternate Plan, marked full exhibit.)

By Mr. Satter:

Q. What does it show with respect to the shapes of the districts in the Town of West Hartford? A. Well, we feel by redesigning it that we accomplished a plan or a

format of reasonably rational shapes and that's why we did redesign it and they're all approaching, anyway, some sort of geometric design, I would say.

Q. And the deviation for each of these redesigned districts in Plaintiffs' Exhibit 9-A is within the Board's limitation? A. Yes, it is.

Judge Zampano: Are there any less segments?

Mr. Satter: No. There's no less segments. There is a segment of this town in both the Board Plan and this.

Judge Blumenfeld: And the part that does not comprise a full district within the town goes to add to Farmington to make up District 21?

The Witness: That's correct, your Honor.

[53] Judge Smith: The only change is in the symmetry or contiguity of the districts, or not contiguity, compactness?

The Witness: Yes, I would say there was considerable change in compactness. If you want to more or less make a quick comparison, I would say that Assembly District—well, I would say Assembly District 20 is now in the southeastern and a portion in the southern part of town; whereas, on the Board Plan, as we went through before, it stretches from the southeast all the way up to the northwest.

I would say, by the same token, Assembly District 19 is less than geometric on the Board Plan. And I would say that it approaches a more compact and more rational shape on the alternative.

By Mr. Satter:

Q. Mr. Vocelli, I now show you another design of Assembly Districts 12 and 13 in the Town of Manchester, which was Saden's Exhibit F. Is that correct? A. Yes.

Q. And is that an accurate portrayal? A. Yes, it is.

Mr. Satter: Mr. McCarthy, may I show you something here, please? I would substitute this [54] for that.

May I have this marked?

Judge Smith: Plaintiffs' Exhibit 10.

Mr. Satter: 10 for Identification. And here is Saden's Exhibit F.

Judge Smith: 10 for Identification.

(Plaintiffs' Exhibit 10 for Identification: Map of Manchester.)

By Mr. Satter:

Q. Mr. Vocelli, I show you again a plan or a map of the same assembly districts in the Town of Manchester, 12 and 13, as the previous exhibit, but without the cross-hatching and the Senate line. I ask you again is that a fair depicture of the outline of Assembly Districts 12 and 13 of the Town of Manchester? A. Yes, it is.

Mr. Wade: This will be?

The Court: 10-A.

(Plaintiffs' Exhibit 10-A: Replaced map of Exhibit 10, marked full Exhibit.)

Judge Smith: Is there an error in printing this copy of that that gave that dog-like figure an eye?

Mr. Satter: Yes. I'm sorry. I saw that myself. That was not to put an eye in it. I didn't [55] notice that till the other night.

By Mr. Satter:

Q. Have you endeavored to make a redesign of Assembly Districts 12 and 13 in the Town of Manchester in order to achieve more rational shapes? A. Yes, we did.

Q. And is that this design? A. That's right, that's the result of our endeavors.

Judge Smith: 10-B.

Mr. Wade: 10-C, I think, your Honor.

Judge Smith: 10 was for Identification; 10-A, the corrected one and 10-B the proposed.

Mr. Satter: I'm sorry.

(Plaintiffs' Exhibit 10-B: Alternate map of Manchester, marked full exhibit.)

By Mr. Satter:

Q. Was Plaintiffs' Exhibit 10-B prepared in order to achieve a more rational design? A. Yes, it was.

Q. Would you outline Assembly Districts 12 and 13 on Plaintiffs' Exhibit A and Plaintiffs' Exhibit B? A. On Plaintiffs' Exhibit A, which is the Board House Plan, Assembly District 12 is everything that is shaded in yellow here and Assembly District 13 of the Board House Plan is everything shaded in orange. It moves from the center of [56] town with a small neck over to the eastern part and then it also includes these orange portions up here.

Q. Would you identify the same assembly districts in Plaintiffs' Exhibit 10-B? A. In Plaintiffs' Exhibit 10-B, our alternative, again everything in yellow is Assembly 12 and it's just to the center of town, basically. And everything in orange is assembly District 13, which is this rather rectangular shape in the eastern portion of the town.

Judge Zampano: What happened up north? What did you do up there?

The Witness: On both plans a northern portion of Manchester is shared with South Windsor or goes to South Windsor forming the assembly district.

In the Board Plan it's this northwestern corner. And on the alternative that had to be shifted about a bit. And I would say that even this hopefully is somewhat a rational shape. It's the northern band across the whole town and it follows right along with the town border itself in Manchester.

The southwestern portion is maintained the same on both plans. It was maintained in tact; namely, the Board placed this southwestern portion with part of East Hartford and this alternative would do the same.

[57] Mr. Satter: Referring to Assembly District 9 when you are referring to the southwest portion?

The Witness: Right. So, in other words, the rearrangement involves Assembly Districts 12 and 13, which we hopefully made considerably more rational shapes and also—

Mr. McCarthy: If your Honors please, I hesitate to continue to press the objection, but a statement of relative rationality is certainly conclusory and I do not think evidential.

Judge Smith: Sustained.

Mr. McCarthy: The witness keeps testifying that his plan is more rational than another.

Judge Smith: If I understand your testimony correctly, this does not reduce the amount of segmentation. It is a question of shape of districts and more compactness or more regularity?

The Witness: That is correct, your Honor. This is just dealing with shapes rather than the segmentation. The segmentation or the amount of it remains the same under the alternative. We were just concerned with shapes in this case.

Mr. McCarthy: Your Honors understand my point of law, if you please, that compactness is not issuable under our federal precedent.

[58] Mr. Satter: Your Honor, of course, we differ with that.

Judge Smith: You may argue that. We will admit it and consider the question when we come to it.

I will overrule the objection at this time.

By Mr. Satter:

Q. I don't know whether I asked you this, but let me make sure that I do. The deviation in the percentage population deviation for the Board Plan, for your redesign of Assembly Districts 12 and 13 is within the Board deviation of limitations? A. Yes, it is.

Judge Blumenfeld: How many more of these have you got?

Mr. Satter: I'm sorry, your Honor. I have a few more

to give you. I'm sorry to do it this way, but I don't know any other way to get them in. I'll do them as quickly as I can.

Judge Blumenfeld: Maybe you can get them marked and set up so that they will be in order.

Mr. McCarthy: If your Honors please, we've been through this demonstration in deposition procedures and I have no objection to the introduction of any or all of these by stipulation consonant with the [59] pre-trial depositions which these pattern precisely.

Mr. Satter: Well, that's true, except that—

Judge Blumenfeld: Why can't they be introduced with a statement as to what they represent and as to what the witness would testify to and in that way avoid the necessity—

Mr. Satter: Yes, I can do that.

Judge Smith: We will take a short recess and you can get them in order and make a statement when we come back.

(Short recess.)

[60] Mr. Wade: If the Court please, during the recess the Clerk has marked several maps which are copies of the plan as prepared by the Board and then an alternative plan as prepared by Mr. Vocelli.

In each case the testimony is the same as you have already heard on these plans that have come in. We are showing the Court, in the first instance, the shape of the districts in various towns and then the same town redesigned with the districts meeting the deviation parameters set by the Board.

Simply for the record at this point, then, we would start with Plaintiffs' Exhibit 11, which is a representation of the Town of Bridgeport, the plan prepared by the Board; and 11-A would be the same town of Bridgeport showing a redesigned district with what we would claim to be more compact districts than appear on the Board Plan.

Judge Zampano: Can you give us the numbers, please?

Mr. Wade: Yes, your Honor. That was 11 and 11-A.

Judge Zampano: I know. But I mean—

Mr. Wade: It's the entire Town of Bridgeport with all its assembly districts. They would be Districts 124, 125, 126, 127, 128, 129, 130 and 131.

[61] Judge Zampano: And do I understand the segments do not change?

Mr. Wade: No.

(Plaintiffs' Exhibits 11 and 11-A: Board Plan and alternate for Bridgeport, marked full exhibits.)

Mr. Wade: The next would be Plaintiffs' Exhibits 12 and 12-A. The first being a representation of the Town of Norwalk showing Assembly Districts 137, 138, 139 and 140 as prepared by the Board.

12-A would be a redesign of those same assembly districts in the Town of Norwalk, the same four assembly districts and all four meeting the deviation parameters of the Board Plan, itself.

(Plaintiffs' Exhibits 12 and 12-A: Board Plan and alternate for Norwalk, marked full exhibits.)

Mr. Wade: The next would be Plaintiffs' Exhibit 13 and this shows in red Assembly District 15, which encompasses part of the Town of Bloomfield and part of the Town of Windsor. This is a representation of the district as prepared by the Board.

Plaintiffs' Exhibit 13-A would be the same Assembly District 15. This once again is just the Town of Windsor being shown here to show how Assembly District 15 can be redrawn with a small portion [62] of Bloomfield down here to meet the deviation standards and what we claim to be a more compact district than was previously drawn by the Board. That was 13 and 13-A.

(Plaintiffs' Exhibits 13 and 13-A: Board Plan and Alternate for Windsor, marked full exhibits.)

Mr. Wade: Finally we have Plaintiffs' Exhibits 14 and 14-A showing in yellow Assembly District 103, and in red Assembly District 104.

Plaintiffs' Exhibit 14 is the plan as prepared by the Board. And we offer it, first of all, to not the non-contiguity of Assembly District 104 in red. As you will note, there is a strip of yellow running down through the Town of Ansonia into the Town of Derby. The portion in red, all of that is in the 104th and there's two parts of it separated by the yellow which is in the 103rd.

Judge Smith: Are there people in that strip there?

Mr. Wade: I'm not prepared to testify to that, your Honor.

Judge Blumenfield: What town, though? Red is in what?

Mr. Wade: We are talking about three towns here, your Honor.

[63] You see, you have the Town of Woodbridge in the large yellow block here. The Town of Ansonia is within this segment right here. And the portion in yellow connects down into the Town of Derby. And the two are joined by that narrow yellow strip.

The two portions in red, which are in the Town of Ansonia here and in Derby here, are all part of the 104th.

Mr. McCarthy: If your Honors please, the answer to your question is available under the Plaintiffs Pre-Trial Factual Claims, Paragraph 4 at Page 2 indicating a population of this non-contiguous area as zero.

Mr. Satter: We concede that, your Honor.

Mr. Wade: Then Plaintiffs' Exhibit 14-A is a redesign only of the Ansonia-Derby portion. The Woodbridge section has remained the same, that large yellow block. We have redesigned Ansonia-Derby to make what we claim to be both a more compact and a contiguous pair of districts.

Judge Blumenfeld: And the population deviations?

Mr. Wade: Fits within the parameters of the Plan, your Honor.

We will endeavor to keep all of these pairs together so that when you have them each will be linked.

[64] Judge Blumenfeld: Yes.

(Plaintiffs' Exhibits 14 and 14-A: Board Plan and Alternate for Ansonia-Derby, marked full exhibits.)

By Mr. Satter:

Q. Mr. Vocelli, I show you now a map relating to Board Senate Plan and specifically Districts 35 and 29, which is Saden's Exhibit H, and ask you whether that is again a fair representation of the shape of those two districts in that? A. Yes, that is a fair representation.

Q. On the Board Plan? A. Right.

Judge Zampano: Excuse me, Mr. Satter. What were the district numbers?

Mr. Satter: I'm sorry. Senate Districts 29 and 35.

Judge Blumenfeld: Senate?

Mr. Satter: Senate. Did I say House?

Judge Zampano: No. You said Senate.

Mr. Satter: Senate Districts 29 and 35 in the, I guess you would call it, northeast corner of the State of Connecticut. And it is Plaintiffs' Exhibit 15.

(Plaintiffs' Exhibit 15: Board Plan, Senate Districts 29 and 35, marked full exhibit.)

[65] By Mr. Satter:

Q. I show you now another map purporting to redesign the Senate Districts 29 and 35 and ask you whether that redesign of these two senate districts keeps within the same percentage deviation as on the Board Plan? A. Yes, it does. I know this because I drew it myself.

Mr. Satter: This, I might say for your Honors, is Plaintiffs' Exhibit 15-A.

(Plaintiffs' Exhibit 15-A: Alternate Plan, marked full exhibit.)

By Mr. Satter:

Q. In Plaintiffs' Exhibit 15 is the Town of Mansfield segmented and cut? A. Yes, it is.

Q. What portion of the Town of Mansfield is segmented in Plaintiffs' Exhibit 15? A. Well, the western portion of Mansfield is taken to the 29th Senatorial District and the 29th, of course, is the eastern most of the two districts.

Q. And does the portion of Mansfield that is cut in the 29th and included within the 29th District include the University of Connecticut? A. Yes, it does. It includes Storrs, which I believe includes the University of Connecticut.

In your redesign of these two districts, which is [66] Plaintiffs' Exhibit 15-A, were you able to avoid dividing the town of Mansfield? A. Yes, we were.

Q. And still keep within the same deviation of limits— A. Right.

Q. —as the Board Plan respecting the Senate? A. That's correct.

Q. And did you also do this for purposes of making a more rational shape as to these two districts? A. Yes. We were also concerned about the shapes.

Q. I show you a map of the Board Senate Plan relating Senate Districts 9 and 31, which is Plaintiffs' Exhibit G in the Saden deposition, Plaintiffs' Exhibit 17 in this trial, and ask you whether that's a fair depicture of these two senate districts? A. Yes, it is.

Judge Zampano: Excuse me, Mr. Satter. 16 or 17?

Mr. Satter: I beg your pardon. That is 17. I made a misorder of this. That is 17 as it is marked here. I can go to 16.

I'm sorry. I picked up the wrong exhibit. Does it make any difference if I continue?

Judge Blumenfeld: Why don't you continue and we will adjust.

[67] Mr. Satter: I can do it the other way.

Judge Zampano: No. That's all right.

Judge Smith: Go ahead.

(Plaintiffs' Exhibits 17 and 17-A: Board Plan and Alternate for Senate Districts 9 and 31, marked full exhibits.)

By Mr. Satter:

Q. Can you show on this small design where the connection is between the Town of Newington and the Town of Farmington? A. Yes, you can. It's not too easy, but there is a connection here between Newington and Farmington. And both Newington and Farmington on the Board Plan are in Senatorial District 9.

Q. And have you looked at a M.E.D. list which would geographically demonstrate the actual boundary lines between the Town of Newington and the Town of Farmington? A. Well, yes. It is not a M.E.D. list. It's a census map and we have looked at it and it appears—these census may not always be perfectly accurate, but it appears that this connection between Newington and Farmington seems to be less than a thousand feet.

Mr. Satter: May I introduce this? It is Plaintiffs' Exhibit 18.

Judge Blumenfeld: What are you talking about, [68] the connection is less than a thousand feet? Can you point it out there?

Mr. Satter: Yes, your Honor.

This little strip right here. Here is the Town of Newington and here is the Town of Farmington and the only connection is this little strip right here (indicating). I will have further testimony on this.

Judge Blumenfeld: All right.

Mr. Satter: This is marked Plaintiffs' Exhibit 18, your Honors.

(Plaintiffs' Exhibit 18: Hartford urban area map, marked full exhibit.)

By Mr. Satter:

Q. Now, in order to avoid that very narrow thousand foot strip were you able to redesign Senate Districts 9 and 31 to show another shape? A. Yes, we were. And while the shape, itself, may not have been completely desirable, it did avoid that nexus, that small nexus of about a thousand feet which we just alluded to.

Q. And is this Plaintiffs' Exhibit 17?

Judge Blumenfeld: 17-A.

Mr. Satter: Well, they marked it 17. It should be 17-A, I guess.

Judge Blumenfeld: Do we have a 17 already?

[69] Mr. Satter: Yes. This must be A.

No. I beg your pardon. You are right. It is. It is 17-A.

Judge Smith: What districts are those in, 17 and 17-A?

Mr. Satter: 9 and 31.

(Plaintiffs' Exhibits 16 and 16-A: Board Plan and Alternate for Senate Districts 18 and 19, marked full exhibits.)

By Mr. Satter:

Q. Now, with respect to Senate Districts 19 and 18, I show you a map again and ask you whether that's a fair depicture of the Board Senate Plan?

Judge Blumenfeld: Are you now on Exhibit 16?

Mr. Satter: Yes, I'm on Plaintiffs' Exhibit 16.

A. Yes, that is a fair depicture.

Judge Blumenfeld: What districts?

The Witness: Districts 18 and 19.

Q. Now, in the design of Senate District 18 on the Board Plan is the Town of Norwich cut? A. Yes, it is. It seems that the southern portion of Norwich is in 18 and the balance of Norwich is in 19.

Q. Do you remember whether or not the Towns of Voluntown and Griswold were originally in the former Senate District 18? [70] A. Yes, they were. Voluntown and

Griswold were in the Senate District 18, that is, of the Plan, shall we say, or the setup that is now being used by the General Assembly but which will, of course, pass out of existence.

Q. And if you eliminated the Town of Voluntown alone and kept the district as it had formerly been shaped, would it have been within a deviation of less than the Board's senate deviation? A. Yes, it would have been. It would have been very close, reasonably close to perfect average. Certainly within the parameters of the Board's plan.

Q. Do you have any figures to indicate exactly what it would have been? A. Not right here at the stand. But I believe it would have been roughly a hundred people smaller or fewer than the 84,228 that is defined as the perfect average of a senatorial district.

Q. Did the Board Plan then, having had a district which was within its deviational limits, do further surgery to Senate District 18? A. Yes, they did. Instead of just withdrawing Voluntown from the present 18th and then leaving themselves with the district that hit the deviation, they in turn also removed Griswold and substituted for Griswold approximately the same number of people in southern Norwich, thus cutting the town [71] of Norwich.

Q. And taking out the whole Town of Griswold and cutting the Town of Norwich? A. That's right.

Q. And including a portion of the Town of Norwich? A. That's right. A portion in the south.

Q. Now, did you prepare an alternative to Senate District 18 which would have retained the Town of Griswold and not cut the Town of Norwich? A. Yes, I did. It was in line with what we were just talking about. This is, indeed, the alternative.

Q. And that is Plaintiffs' Exhibit 16-A.

Now, Mr. Vocelli, have you prepared a set of designs or outlines of the various Assembly Districts contained in this document? A. Yes, I did prepare this document or

the originals that went to the making of this document; yes.

Q. And is the outlines of the districts therein prepared accurate as depicted on the Board Plan? A. Yes.

Mr. Satter: I offer it.

Judge Smith: 19.

(Plaintiffs' Exhibit 19: Outline of Board Plan with maps, marked full exhibit.)

By Mr. Satter:

[72] Q. Mr. Vocelli, at my direction and at my request have you prepared an apportionment plan for the House of Representatives with a deviation of plus or minus 4 per cent? A. Yes, we did prepare such a plan with approximate deviations of plus or minus 4 per cent.

Q. And did you, at my request, have as the criteria for preparation of that plan simply to keep within a deviation of plus or minus 4 per cent, limiting the number of towns which had to be divided under that deviation and also keeping to the minimum the number of segments of towns that had to be divided? A. Yes. That was our order of priorities, that's correct.

Q. Is this that plan? A. Yes, it is.

Mr. Satter: May I offer it.

Judge Smith: 20.

(Plaintiffs' Exhibit 20: Plan within 4 per cent deviation.)

Mr. Satter: The exhibit would consist of a face sheet indicating its characteristics, to identify it for everybody, a face sheet indicating its characteristics; that is, the range of deviation, the ratio of the largest to the smallest and a column indicating this range of deviation by number [73] of districts and by cumulative frequency and also indicating the number of towns cut.

On the next page is the actual description of the plan in terms of the individual districts, each individual town

being assigned to specific districts, with the population in each of these districts, and the deviation from the perfect average.

And finally a map of this plan. If that can be all marked as one exhibit, your Honor, I think that might be helpful rather than dividing it up.

Judge Smith: It may. That's the 4 per cent plan. No. 20.

By Mr. Satter:

Q. Just for purposes of clarification, although we denominate it as a plus or minus 4 per cent deviation, in fact the range was from plus 4.02 per cent to minus 4.08 per cent, is that correct? A. Yes, that is correct.

Q. And under than plan, under that House Plan, how many towns are divided? A. I believe it's 36 towns that are cut or in some way have a portion taken out to form a district not wholly within that town.

Q. And how many segments of towns are created? A. I believe that plan created 49 segments.

[74] Q. Now again just for elucidation of the Court, what do you mean by a segment? A. Well, we have defined a segment to mean a portion of a town used in forming an assembly district that is not wholly within that town. So, in other words, when we say there are 36 towns cut, that means that yes, indeed, 36 towns in effect had their boundaries violated, but we also feel to project the, shall I say, true impact of any particular slicing on any given plan that you also should inject the factor of segments as we defined it because there are towns that have more than one portion taken out of them to go into several other districts outside the town.

Q. Have you, at my direction, also prepared a Plan of the House of Representatives with the same number of house seats as in the Board Plan and a plus or minus 6 per cent deviation? A. Yes, we have.

Q. Is this that plan? A. Yes, that's the plan.

Mr. Satter: I offer it.
Judge Smith: Exhibit 21.

(Plaintiffs' Exhibit 21: Plan within 6 per cent deviation, marked full exhibit.)

By Mr. Satter:

Q. Excuse me. I wonder, just to be sure because I don't [75] think I said it, with reference to Exhibit 20, which is the plus or minus 4 per cent deviation, the number of House seats were also 151? A. That's correct.

Q. The same as in the Board Plan, is that correct? A. That's correct.

Q. Now, the actual range of this plus or minus 6 per cent deviation, as we have denominated it, Plaintiffs' Exhibit 21, was a high of plus 5.88 per cent and a low of minus 5.97 per cent? A. That's right.

Q. And when you refer to high and low of these percentage deviations, again what are we referring to? A. Well, by that, when we say high we mean if a high is plus 5.93 per cent, or whatever it was, that means that the largest district, the district with the greatest population in any given plan deviates from the perfect average by plus 5.93 per cent.

By the same token, when we say a low of minus such and such a per cent, that means that the lowest or the smallest district in terms of population in the plan deviates from the perfect average by that given per cent.

And then when we go from high to low, naturally you are just summing the two numbers, the high percentage and the low percentage. In that way you get a total deviation from [76] top to bottom, so to speak.

Q. From the largest to the smallest? A. From the largest to the smallest.

Q. Now, under the plan in Plaintiffs' Exhibit 21, plus or minus 6 per cent deviation, how many towns are divided? A. It was a total of 31 towns that had their boundaries violated, so to speak.

Q. And how many segments of towns were created? A. I believe it was 39 segments that were created.

Q. Mr. Vocelli, again at my direction did you prepare a plan for the House of Representatives with 151 seats and providing for a deviation of 7.5 per cent? A. Yes, we did.

Q. Is this that plan? A. Yes, it is.

Mr. Satter: I offer it.

Judge Smith: 22.

(Plaintiffs' Exhibit 22: Plan within 7.5 deviation, marked full exhibit.)

By Mr. Satter:

Q. And are the actual deviations under this plan plus 7.43 per cent and minus 7.32 per cent? A. Yes, they are.

Q. And how many towns are divided under this 7.5 per cent plan? [77] A. 27 towns were cut or divided for a total of 35 segments in this particular plan.

Q. Mr. Vocelli, finally at my request did you prepare a House Plan in which no regard was to be given to avoiding the cutting of town lines, but simply you were to get to the lowest possible deviation for the House that was possible under the census data that was then available to the Board? A. Yes, that's correct. We just went down the deviation, forgot or basically forgot about our concern for town lines; right.

Q. And that is wherever, of course, you could avoid cutting town lines and get the lowest possible deviation you did. But where there was a choice between cutting a town line but getting to the lowest possible deviation, you chose to get to the lowest possible deviation; is that correct? A. That's generally correct, right.

Q. That was the standard you used in the development of this plan? A. Right. For that plan it was deviations that we focused on as low.

Q. Lowest deviation? A. Yes.

Q. Is this the plan that you prepared? A. Yes, that's it.

Mr. Satter: I offer it.

[78] Judge Smith: Plaintiffs' Exhibit 23.

(Plaintiffs' Exhibit 23: Plan with lowest deviation, marked full exhibit.)

Judge Zampano: How many towns were cut?

By Mr. Satter:

Q. How many towns were actually cut, although that was not a standard? A. I believe it was 58 towns.

Q. 58 towns were cut. And how many segments? A. 88 segments.

Q. And what was the actual deviation which you achieved? A. I believe it was a high of about 1.6 per cent and a low of 1.01 per cent.

Q. Just a few more matters, Mr. Vocelli. In the Town of Bristol certain block groups are omitted—excuse me. Let me withdraw that and start that sentence again.

In the Town of Bristol are there any block groups omitted from the description of the House Plan? A. Yes, there are.

Q. What block groups are they? A. Well, I believe it was—I forget the exact numbers they were in, but I believe it was block 2, 3 and 4 of one tract; 2, 3 and 4 of a second and block groups 2, 3, 4 and 5 of yet a third—for a total of about roughly 13 block groups that were omitted.

[79] Q. Now, if I just show you this Plaintiffs' Pre-Trial Factual Claims and ask you to look and identify the particular census tracts to which these block groups related? A. Right. In Bristol census tract 4052 had 3 block groups omitted and census tract 4054 also had 3 block groups missing. And census tract 4055 had 4 block groups that were omitted from the Board's Plan.

Q. And how many people can you determine from the census information lived in those omitted areas? A. Well, we computed that it was approximately 13,543.

Q. In the Town of Fairfield was there omitted a block group from the description of the Assembly Districts in that town? A. Yes, there was.

Q. Can you identify the block group number and the census tract to which it refers? A. It was block group 9 of census tract 604 in the Town of Fairfield.

Q. And how many people were involved, how many people does your census information indicate reside in that designated area? A. 89 people.

Q. Now, was there omitted from the description of Assembly Districts for the Town of Enfield a block group relating to a certain census tract? [80] A. Yes, there was.

Q. And what was the block group that was omitted and to which census tract does it refer? A. It was block group 2 of census tract 4807 in the Town of Enfield.

Q. And can you determine how many people resided in that particular block group? A. In this particular event it could only be an approximation. I couldn't get any exact determination.

Q. But there were some houses in that area? A. Yes. Apparently there were some houses in that area.

Mr. McCarthy: If your Honors please, these items appear paragraphed in the first four paragraphs of the Plaintiffs' Pre-Trial Factual Claims.

Mr. Satter: Your Honor, that doesn't constitute very much proof until we prove it, I think.

Judge Smith: Are they stipulated to?

Mr. McCarthy: I would stipulate to the fact that the description, in fact, omits these several census descriptions and that Assembly District 104 on the face of the plan is, in fact, nominally non-contiguous.

I, of course, dispute that it was intended to be that way and maintain that the intent of the Board was entirely to the contrary and that the plan may [81] easily be corrected in these minor particulars.

Mr. Satter: Will you also stipulate that the population figures that Mr. Vocelli has just related are accurate for the omitted census tracts for Bristol and Enfield?

Mr. McCarthy: I believe they are.

Mr. Satter: Excuse me. Bristol and Fairfield. Did you say yes, Mr. McCarthy?

Mr. McCarthy: Yes.

Mr. Satter: Will other counsel consent?

Judge Blumenfeld: Aren't these errors the subject of proceedings in the state court to secure a correction of the Board's plan in order to take account of these errors?

Mr. McCarthy: They are indeed, your Honors, and I have available a certified copy of the state court proceedings to demonstrate those in the course of the maintenance of our first defense of abstention.

Judge Blumenfeld: Is that right, Mr. Satter?

Mr. Satter: Is what all right?

Judge Blumenfeld: Is it correct that the rectification of these errors in the Board's plan is being sought in a proceeding in the state court?

Mr. Satter: Yes, that is correct, your Honor.

[82] Judge Blumenfeld: Is there any difficulty anticipated in having a correction made under judicial auspices in the state court?

Mr. Satter: Yes. I think there is considerable difficulty, your Honor, if I may say so. It is only one part of what has now become, I think, a fairly complex case.

Judge Blumenfeld: I'm not talking about the other parts.

Mr. Satter: I don't know of any procedure in the state court for dissecting one fact in a state court.

Judge Smith: Have these omitted people been counted toward the total number in the assembly district within which that area falls?

Mr. Satter: Yes, they have, your Honor. And the stipulation that is on file so specifies.

In the Stipulation of Fact that all the parties signed there is a census bureau statement of the population of each district and the census people have assigned to the particular assembly district the people which are omitted from the description of the plan.

Judge Blumenfeld: If they have been counted, then what is the significance of this evidence?

[83] Mr. Satter: To show that, in fact, they are disenfranchised in the plan, itself.

Judge Blumenfeld: You mean that although counted they don't fall within any of the lines within the plan or what?

Mr. Satter: Or with any description of the plan.

The Board Plan as such consists, if you will look at it, of a description of each of the assembly districts by reference to census tracts.

Judge Blumenfeld: Then you are saying that the lines that are drawn do not include these people?

Mr. Satter: No. What we are saying is that the description, the official description of the assembly districts, which is the Board's description, does not include these districts. There was no actual map submitted by the Board.

Judge Smith: These maps are made up afterward, not as part of the report of the Board?

Mr. Satter: They are not as part of the Board, yes.

Judge Blumenfeld: So then it is just a problem of map making in order to give effect to what the Board imperfectly described?

Mr. Satter: That's correct. I quite agree [84] with Mr. McCarthy; it's a very simple thing.

Judge Blumenfeld: Then why are we dwelling on it here?

Mr. Satter: We are going to get off it immediately.

Judge Blumenfeld: All right.

By Mr. Satter:

Q. Finally, Mr. Vocelli, Mr. Lafferty testified that certain towns have town meeting forms of government? A. That's correct.

Q. Namely, the Towns of Burlington, Haddam, North Haven, Redding, Fairfield, Groton, Westport, Bloomfield,

Granby, Killingly, Ledyard, Montville, Vernon, Watertown and Windsor. Are those towns divided in the Board House Plan? A. Yes, I believe all of those towns that you listed are divided or cut in the Board House Plan.

Mr. Satter: Your Honor, I have no further questions.

Mr. Cannon: I have no questions.

Mr. Beizer: No questions.

Judge Blumenfeld: Just a minute. I would like to ask Mr. Vocelli something.

By Judge Blumenfeld:

Q. You have prepared some redesigned districts that have been submitted here today and I ask you whether any of [85] those which are submitted as redesigns today were submitted to this Board before the Board made its final determination of the district lines? A. That would be difficult for me to answer in that sense, your Honor, because although I did quite a bit of technical work and analyses and such for various members of the Board, the House Plan and the Senate Plan that finally evolved from the Board's majority, I really can't say that I had very much input; at least not in the areas of concern that we have delineated here.

So whether or not, for instance—and Hamden is one of the examples—whether or not the artists or the drawers of the final plan, whether or not the alternatives occurred to them, well, I certainly couldn't presume to speak for those people.

Q. I see. Now, another thing. Exhibit 23 is a plan that you have drawn or a proposed plan for the House and it shows a deviation on the high side of 1.60 and on the low side of 1.01? A. That's correct.

Q. Now, to what do you attribute that deviation from mathematical exactness? A. Well, the problem is that when you are working with census data sometimes, shall we say, the size of the block groups in a particular area that you're moving aren't just [86] what you would have

them in terms of population. So as I remember it there were only four districts on that plan that exceeded plus or minus 1 per cent, and there was that high one that was plus 1.6 per cent and if I'm correct after that the other three that exceeded it were all pretty close to plus or minus 1 per cent, but just exceeding it by a bit.

Q. When you say a group, a census group—is that what you talk about? A. Right. In other words, when you draw a plan first you sit down with a map, a small map, generally speaking, and you draw up combinations of towns in which you think you might be able to fit so many districts.

Q. But a group consists of how many units, how many persons? A. Well, that really varies.

Q. That varies, too? A. Right. And sometimes when you try to draw one of these districts within your original combinations sometimes you can't get the exact population you're seeking because these block groups, as they are called, they are the smallest building blocks we had. They ranged anywhere from, I believe the figures are, 1—

Q. But you have to divide a group then to get mathematical exactness and there's no way of knowing who— A. Well, that's right. We didn't want to cut any census [87] block groups because then we would be making assumptions that may not be correct. In other words, we wanted to adhere strictly to census data that was available in time. We didn't want to make any rash assumptions as to estimates by cutting block groups.

Judge Blumenfeld: That's all I have.

Cross-Examination by Mr. McCarthy:

Q. Mr. Vocelli, you have testified that you worked for the Legislative Committee, the subsequent Reapportionment Commission, briefly before the Plan was filed September 30, 1971, for Judge Saden and Judge Parskey and Judge Thim, and finally now for the plaintiffs in this action; am I correct? A. Yes. I would say as far as—essentially

correct, sir. But I would say that it was somewhat more than briefly for the Board.

In other words, we worked for various members of the Board. First Judge Parskey and then toward the end of the Board's deliberations in more or closer contact with Judge Saden, of course.

But I wouldn't say it was necessarily briefly. We worked for the most part, if my memory serves me correctly, throughout most of the summer right on straight through.

There was a hiatus there between the Commission and the Board constituting itself. I don't really remember just [88] how long it was. But you are essentially correct, right.

Q. Would it be fair to state that during your relations with the Legislative Committee and Reapportionment Commission you were functioning essentially for the Democratic members of those groups? A. Yes, that would be a fair assessment of it.

Q. In reference to instructions you have received, if any, from Judges Parskey, Saden and Thim, in your activities on behalf of the conclusory Reapportionment Board can you recall and state your general instructions as to guidelines in the preparation of plans. A. Well, I would say, first of all, that I never had any dealings at all with Justice Thim. I've never had the pleasure of meeting him.

And as I remember it, when we worked with Judge Parskey he was basically concerned, if I'm not mistaken, he was concerned with questions of how certain districts would break down politically and such.

And what we originally started to do was take the old Commission—plans of the defunct Commission, they had failed to agree on these plans, and I think the first step he had us do is work out some revisions to see if anything would be feasible along those lines.

And then it was decided that no, it wouldn't, so we went to other variations and other combinations. And again [89] one of our prime concerns, if I remember it right or

I'm sure it was a concern even if it was unspoken, was to maintain a substantial population equality that runs throughout this whole procedure, of course.

And then in the last three weeks or so we worked, I'd say, maybe two weeks, we worked much more closely with Judge Saden and also with Mr. Robert Orcutt and Mr. James Collins. And at that point Judge Parskey had more or less passed out of the picture and we were instructed, of course, to lend our services more closely with the majority members of the Board. And we checked over plans and we helped them get out the final Plan.

Judge Blumenfeld: Who is this "we" you talk about?

The Witness: My colleague. In other words, another reapportionment analyst or whatever; Mrs. Karen Weiss. She was also hired at the same time I was to work for the Reapportionment Committee and then for the Commission and then for the Board, et cetera, et cetera. So that's why I often inject the "we."

Judge Blumenfeld: All right.

By Mr. McCarthy:

Q. Do you recall instructions from Judge Saden, in particular, and in conclusory stages of the development of what proved ultimately to be the Board Plan, Judge Saden's [90] instructions, guidance and direction with respect to the development of what he constituted as a fair plan politically? A. I do recall from discussions, if not with Judge Saden from Mr. Collins who worked closely with him, that they, yes, indeed did have a conception of what did constitute a fair plan.

Now, of course, we didn't or I didn't really get too much of a chance in the end there to effectuate that. At that point I was more in a checking function. But as I understood it, their conception of a fair plan was to set up a political balance, in other words, they would draw plans and they would check the 1966, '68 and '70 returns. And we

also did this, if I recall correctly. We also did it for Judge Parskey at times.

They would check various plans and options against the 1966, '68 and '70 legislative returns. The idea being that a fair plan or a fair political balance, as they put it, would be a plan in which a party's strength in a legislative body corresponds in proportion to the amount of popular vote it got in all the legislative races for that particular body throughout the state. And as I understood it, that was their conception of a fair plan.

Q. Let me read to you Paragraph 9 of the Plaintiffs' Pretrial Factual Claims in this particular.

"The assembly and senatorial districts in the Plan [91] were designed so that each major political party elected a number of its candidates to each house of the Legislature in proportion to each party's total state-wide vote for all of its candidates to that house. For example, if the total vote for all of the Republican candidates running for the office of state representative in all the various districts throughout the State was 51 per cent of the votes cast, then Republican candidates for state representative would win 51 per cent of the individual district elections, with reference to the depositions of Messrs. Saden and Collins."

Do you recognize that as a fair statement of your direction and intent? A. Well, as I understand it, that was—or as I undersood it, that was the direction and intent of the goal of the Board and of the members on the Board. And that, I think, corresponds to the way I described it; namely, the Board's, or at least the majority of the Board, it seemed to me that its intent was to achieve that proportional breakdown based on political election returns, yes.

Judge Blumenfeld: Mr. McCarthy, were you reading from something?

Mr. McCarthy: Yes, sir. I was reading from Mr. Satter's Pretrial Factual Claims, Paragraph 9.

Judge Blumenfeld: I see.

By Mr. McCarthy:

[92] Q. Do you recall, Mr. Vocelli, with respect to plans you prepared, at any time during your tenure in connection with reapportionment proceedings, what the deviations and maximum plus and minus were with respect to Senate or House, or both? A. Well, there are so many preliminary plans that it would depend on which phase and what plans. I would say that during the Committee stage of the process, that is, when the Reapportionment Committee of the General Assembly had jurisdiction and during the Commission phase I got the impression that the plus or minus allowable deviation for the Senate that was being bandied about was plus or minus 3 per cent.

However, the final senatorial plan that apparently the senate member of the Commission agreed upon brought it down considerably lower in the case of all except one district. In other words, I think the senate members of the second phase of the whole reapportionment process, that is, the senate Commission members, did tentatively agree on a plan with every district drawn and I think they got it down to close to 1 per cent in most instances.

Let me see now. I would say that a figure for the—and, of course, the Board of the senate reduced it to plus or minus 1 per cent on the final plan.

I would say there were an awful or a great number of percentage deviations that were experimented with and con- [93] sidered at various phases of it. One that sticks out in my mind, many throughout part of the process was plus or minus 5 per cent for the House. I know I did many plans at that. I did some higher, some lower.

As it turned out the Board, of course, settled on the basic parameters of plus or minus 4 per cent.

Q. Did you ever attain any completed plan with deviations overall in maximum less than those established in the plan promulgated by the Board? A. Well, yes. One of the plans entered as an exhibit had deviations that were less. It went from plus 1.60 per cent to minus 1.01 per cent.

Q. You are referring to Plaintiffs' Exhibit 23? A. I believe so.

Q. Which I understand you prepared for this suit? A. Yes. As a demonstration of what can be done, yes.

Q. Was that plan available to the Board? A. No, I don't believe it was. No, it wasn't

Q. When did you do it, Mr. Vocelli? A. I did it in working in conjunction with the plaintiffs. I did most of it—

Q. Subsequent to September 30th, 1971? A. Yes. The plus or minus 1.6 to 1.01 was done subsequent. Or I should say "we" didn't. I shouldn't take all the credit or blame myself, I suppose.

[94] Again, with respect to the doing of the Board in the composition of the ultimate plan, your recollection, if any, Mr. Vocelli, with respect to the maintenance of town integrity in the formation of House districts. A. Yes. I got the impression that again I wasn't privy to the negotiations and such that were carried on between Judge Saden, Judge Parskey or among Judge Saden, Judge Parskey and Justice Thim. But I got the impression that once it became clear and obvious that there would have to be some violation of the state prohibition against town cuts, I got the impression that after that concern about the integrity of town lines diminished to virtually nothing. In other words, there seemed to be no concern about it. Once it had to be violated once, that was it. That was my feeling.

Q. You, if I remember correctly, have testified that there is some considerable input into the finally approved Board Plan of antecedent developments in planning during the operations of the Legislative Committee and Reapportionment Commission. Can you recall, please, how much of the final plan is the product of those antecedent developments? A. I would say that in the Senate I believe there are several districts that are almost identical. In other words, they had been done before and they were in some of these files that are used. But I would say the Senate plan is largely changed. By the same token, the House

Board Plan was quite a [95] break of what was being bandied about before.

However, in certain specific areas where the number of seats assigned to the same town or combinations of towns remained the same, I believe that previously-drawn plans were incorporated into the Board Plan. But I would say—it is a rough guess—I would say no more than 15 out of 151 districts, 15 or 20 out of 151 districts on the Board House Plan and just several on the Board Senate Plan.

Now, in some cases there were coincidences, so to speak, where as you drew out the preliminary master plan some of the districts would come out the same; some of them multitown districts.

I got the impression that most of the cutting and most of the House and Senate Board Plans, not all, but most, were more or less done from scratch, except where it was convenient to do otherwise because of time factors.

Q. And do you recall any areas of basic agreement with respect to the composition of the House Plan, particularly between the Republican and Democratic elements of the legislature and the Reapportionment Commission? A. Could you rephrase that again?

Q. Yes.

Can you recall whether in the doings of the Legislative Committee and the Reapportionment Commission, both antecedent to the doings of the Board, can you recall whether there [96] were not substantial areas of agreement in various sections of the state as between Republican and Democratic contingents in the legislature? A. In other words—

Mr. Satter: Your Honor, I object to that. I do not see its relevancy.

Judge Smith: Overruled.

A. All right. You're asking me, as I understand it, were there negotiations and agreements during the Commission and Committee phase?

Q. Yes. Did the Republican and Democratic elements of the Legislature and Commission settle upon some areas of the state as matters of mutual agreement? A. Yes, they did.

Q. And would it then be fair to say that conclusively the Board filled in the remainder? A. I don't think it would be too fair to say that, no, because as I pointed out before the Board Plan did incorporate some sections, yes.

But I got the distinct impression—of course, I didn't offer or authorize or draw up the final Board Plan myself. But I got the impression that, for the most part, the majority of the Board was not too enamored with much that the Commission had and, for that matter, the Reapportionment Committee had virtually settled on.

[97] In other words, I got the impression that the Board majority felt, for instance, the Commission Senate Plan that was tentatively agreed upon was very poor. So for the most part it was back to the drawing boards by the Board. That's the impression I got.

Judge Blumenfeld: You did say, I thought, that about 15 of the assembly districts that were in the final Board Plan and considerable similarity to those in the Commission's Plan?

The Witness: Or things that were in the Commission's files. And I took that to mean, first of all, there was a time element. Here was something that was done and the particular area of town was done in the same fashion.

So I guess the authors of the Board Plan figured in areas alike that where they had no dispute with what had been done and by, say, the Commission, or whatever, and were fitted to their plan, yes, they did incorporate it.

Judge Blumenfeld: You said that that, you thought, was about 15 out of 151?

The Witness: Right. That's what I remembered as quickly now. I couldn't say whether it was more or less. I couldn't really sit down and count them.

But it seemed there were few errors where, yes, [98] they did incorporate from prior goings on. For the most part I got the impression that for the overall grand scheme, especially on the Senate, anyways, or for the overall master plan, the preliminary plans drawn up, I got the impression that the Board shied away from a lot of the Commission's ideas. So, therefore, they would pick and choose. But they did not feel constrained to make radical changes from what the Commission was working toward.

But again I wasn't really privy to the negotiations, per se, between the three judges.

By Mr. McCarthy:

Q. Do I understand all right that Plaintiffs' Exhibits 5 through 23, being the alternative segmentary plans, demonstrated in part on the easel, and then the overall 4 per cent, 6 per cent, 7½ per cent, 2.61 plans, Exhibits 20 to 23, are your work product since September 30th, 1971? A. For the most part, as far as I can recall, yes.

But again I'm sure there's some instances where perhaps in the interest of time if there was something in the files which met our criteria—and by our criteria I mean getting the substantial equality in rigorously reducing the number of cuts and segments—that I'm sure we incorporated or adopted. In other words, these were submitted, as I understand it, primarily as demonstrations to show what can be done [99] with this whole town segmenting concern.

Q. Do you have any specific recollection of displaying any of these plans to the Legislative Committee? A. To the Legislative Committee? Now by that you mean either the plus or minus 4, or the plus or minus 6 or plus or minus 7½?

Q. Any of these alternatives. A. No, I don't have any recollection of that because—

Q. Or any of these 4, 6, 7 and 2.61 plans? A. Let me see. I don't have any recollection of going over, in any great detail, any of this.

Q. How about the Reapportionment Commission? A. No. I would say the master plans, anyway, for all of these four alternatives or demonstrations for the master plan, the overall grand scheme, was drawn up I think after the Commission and the Board, as far as I can remember. So there wasn't any particular consultation with anyone.

Q. How about then with respect to any such submissions to Judges Parskey or Saden? A. No. I don't think any of these were submitted, per se, because again most of this handiwork or most of this work was done again after the Board submitted its plan.

As I said before, we worked in some things for Judge Parskey and as he passed out of the picture, after that it was certainly not to any great degree our interest; it was mostly [100] checking and rechecking. The plan that the Board majority had determined would be the plan submitted on September 30th.

Q. Do you recall, Mr. Vocelli, the circumstances in the development of the Board Plan for the Montville area, Plaintiffs' Exhibit 7, in which you have developed certain changes? A. Yes, I do recall it.

Now, I didn't personally witness or hear this, but I was told I believe by Mr. Collins, Mr. James Collins, that Judge Parskey had called Judge Saden, and this was after Judge Parskey had more or less—well, after he had been outvoted, so to speak. He had given Judge Saden a call and asked him what was going to happen to Ruby Cohen, who was a legislator from Colchester.

Again I'm just repeating what I remember or was told to me. And as it turned out apparently a change was made in that area, that New London County area, to facilitate Rubin Cohen's chances of winning re-election, I suppose.

Judge Blumenfeld: What did they take away from him or what did they give back to him?

The Witness: Well, apparently, if I remember right, they were tentatively settled on having the district of

Colchester, East Lyme and it's the town in between. It escapes me. But—

Judge Smith: Salem?

[101] The Witness: Salem. Colchester, Salem and East Lyme. Thank you.

And Rubin Cohen lives in Colchester and I suppose that district, from what I was told and from what I could see myself, would not have been too propitious for him. So as I was told by Mr. Collins, Judge Parskey had called Judge Saden and requested a change upon hearing that. And I was told by Mr. Collins that Judge Saden had agreed to make the change and the change involved or, as I understand it, was responsible for the additional segmenting of Montville unnecessarily.

In other words, he had to reshuffle quite a bit.

Judge Blumenfeld: He had to give part of Montville to Ruby Cohen's district, is that it?

The Witness: As I recall, that's what happened.

By Mr. McCarthy:

Q. Do you recall soliciting yourself directly, Mr. Vocelli, from the Board changes in the tentative Board Plan with respect to districts comprising Waterbury and New Haven? A. Yes, I do.

In Waterbury, if I'm not mistaken, it was a case where two incumbents were going to be placed in the same district and the Board was prepared to create two Waterbury-based districts. And as it turned out both incumbents in the Water- [102] bury area were to be placed in the same district.

Upon noticing I brought it to the attention of Mr. Collins and changes were made to separate the incumbents.

And also in New Haven, as I remember it Senatorial District 10, the Board was going to make it West Haven-New Haven; part of West Haven, part of New Haven. And as I recall, Senator Lieberman of New Haven was concerned about what portion of New Haven he had. And as

we were checking over the Senate plan with Mr. Collins Senator Lieberman came into the so-called Reapportionment Committee room. As it turned out, at that moment, we were checking over the New Haven census tracts for the senatorial districts.

So at that point Senator Lieberman saw what the Board was planning to give him and he asked Mr. Collins if it could be changed. And Mr. Collins said that he doesn't have the authority, that Judge Saden did. Judge Saden then walked in and Judge Saden gave permission—Judge Saden delegated the authority to Mr. Collins to make the changes involved that Senator Lieberman requested.

Q. With respect to Plaintiffs' Exhibit 8, Mr. Vocelli, comprehending your proposed realignment of Hamden and New Haven, considering—

Mr. Satter: Excuse me. That was not Hamden-New Haven. It was Hamden and North Haven.

Mr. McCarthy: Excuse me. North Haven.

Judge Smith: I think we will take our noon recess at this point until two o'clock.

(Luncheon recess.)

AFTERNOON SESSION

Judge Smith: You may proceed.

Mr. McCarthy: Thank you.

By Mr. McCarthy:

Q. I've tidied up just a small summary of eight more questions, including the one on which we had concluded in which I was inquiring, Mr. Vocelli, with respect to Plaintiffs' Exhibit 8 concerning Hamden and North Haven. Whether you would not agree, considering the population in Hamden and North Haven, that those two political entities would have to be cut, assuming a 151 seat House and a roughly 20,000 population? A. Yes, I'd agree that they do indeed have to be cut if we want substantial population

equality. However, the point of what was submitted as an exhibit was that they are excessively segmented.

In other words, I think the exhibits or the alternatives demonstrate that you—or, rather, one could, with a 151 seat setup, draw a plan so that the Town of Hamden would have two assembly districts totally within its boundaries and the Town of North Haven would have one assembly district totally within its boundaries.

But the Board, for whatever its purpose, excessively segmented it so that Hamden only had one district totally within and North Haven had no districts totally within; thus [105] shattering the integrity of the municipal subdivisions more than was statistically necessary.

Q. Do you recall, Mr. Vocelli, one Senate plan which essentially trisected the City of Meriden?

Mr. Satter: Your Honor, again I object to that as being just irrelevant. I don't understand what one Senate plan some place else means in terms of this case.

Mr. McCarthy: The next question I hope will make the relevancy apparent, your Honors.

Judge Smith: Proceed.

A. I think I do recall that during that phase in which we were working with or for Judge Parskey, whose input, of course, was eventually to be practically nil, I do believe that there was one series of plans or districts or cuts that we were doing for him that did entail what you described, if I recall correctly.

Now, whether or not he later revised it, I'm not sure. I do remember commenting either to my colleague or to him that it's certainly not desirable to cut a town in such a fashion. I don't recall just what he did about it. All I know is that certainly it never got anywhere.

Q. Do I understand you to be saying, Mr. Vocelli, that you are the author of that particular trisection and you did it for Judge Parskey? [106] A. Well, I myself, as far as I recall, was not the author. But working with my colleague I certainly, as I said, do recall such a trisection.

Now, which one of us drew it or whether it was Judge Parskey's suggestion, I can't recall that specifically. But it was part of material that we were doing for or submitting to him.

Now, whether or not what he was suggesting at that time mandated that sort of cut, I don't remember. But, as I said, the idea of a trisection does stand out in my mind and I do remember expressing my general distaste for such a cut. Now, whether it was to my colleague or to Judge Parskey, I'm not sure. But, of course, it went down the drain and nothing ever came of it, in any event.

Q. I asked you this morning with respect to your request for changes in the compositions in Waterbury and New Haven. May I inquire whether you made an additional such request with respect to an assembly district in New Haven?

Mr. Satter: Your Honor, again I simply object on the ground that what requests he might have made is just totally irrelevant to the issue in this case. I just can't see the relevance of it.

Here is a subordinate making a request when, where, to whom.

Judge Smith: Well, you had gone into, on Direct, the methods that were used and to some degree we will [107] allow Cross on it.

A. Yes, I do recall requesting that in New Haven an assembly district, I believe, one block group be moved. I think the purpose, if I'm not mistaken, was to keep two incumbents separate.

But as it turned out, although I was told that that change would be made because in any event it would have exceeded the population deviations, as it turned out that change was not made. I don't know what happened along the line, but what I had in effect raised a protest about was maintained. In other words, I made a suggestion. I made the request. But for whatever reason, when the plan was filed my input in that particular case or my suggestion was not even filed.

Q. Referring to Plaintiffs' Exhibit 19 I show you, in particular, Page 5, Assembly District 5 under the Board Plan? A. Yes, that's correct. That is Assembly District 5.

Q. Did you devise that district, Mr. Vocelli? A. If my memory serves me correctly, I believe that my colleague devised it, if I'm correct in that. I think that was most likely one of the, as I said, about 10 or 15 districts or cuts that the Board saw fit to draw right from prior files and to insert the plan in the interest, I assume, of convenience and time.

Q. May I inquire whether you have any particular characterization with respect to the shape of that district? [108] A. Yes. I would have a characterization. My feeling is that the neck in the center of the district is, shall we say, of strained contiguity. And if I were in a position of authority I would like to think that I would try to eliminate such a position of strain or, rather, such an example of strained contiguity and in drawing up these demonstration plans that we've submitted I made just such an effort and I feel succeeded in revising the Hartford situation.

So that that particular district which the Board saw fit to accept would not be there if I had my druthers, so to speak; if I were in position of authority.

Q. Showing you Defendants' Exhibit 1 for Identification, may I inquire whether you recognize this as the final Commission draft for the Senate? A. This would, at first glance, appear to be the final Commission draft. Of course, it's not too easy to make heads or tails out of. But since it is entitled, "Final Commission Draft" I would most likely say that, yes, it is. And by the Commission we mean the eight member body which never reached agreement, yes.

Q. That is correct. A. Yes.

Mr. McCarthy: I should like to offer this as a full exhibit.

Judge Blumenfeld: Any objection?

[109] Mr. Beizer: No objection.
Mr. Satter: No objection.
The Court: May be marked.

(Defendants' Exhibit A for Identification: marked full exhibit.)

By Mr. McCarthy:

Q. May I refer you specifically on that plan to the same geographical area concerned for the land bridge referred to in proceedings this morning. With respect to the Senate composition of the district comprising Newington and Farmington do you find that same configuration here? A. Yes, it's a similar configuration or phenomenon; namely, the very strained—or I would characterize it as an extremely strained contiguity such as to be an almost non-existent connection. Yes, that is present here.

Q. Did you present a Senate plan to Judge Parskey or develop one together with him? A. Well, as I said, we worked on numerous Senate cuts and revisions and we attempted to—as I also, I think, indicated earlier, as our starting point we attempted to revise some of the Commission data that had been bequeathed to the Board. And as I remember in the preliminary stages of my association with Judge Parskey, if I'm not mistaken this is one instance where both he and I agreed it would be certainly desirable, if at all possible, to do something to eliminate [110] that very phenomenon in Farmington-Newington that we're talking of.

Now, as it turned out, the Board itself did not see fit to eliminate it. But why, I don't really know.

And for that matter why the Commission, that is the four state senators serving on the Commission, why they chose to devise this I have no idea either, because my input on this particular area of the Senate plan while working for the Commission was non-existent or virtually non-existent.

Q. Now I understand, Mr. Vocelli, that during the last few days before the Board concluded its deliberations and filed its plan September 30th you worked directly with the Board? A. Yes, with the representative of the Board majority; namely, Judge Saden and also quite closely with Mr. Orcutt and Mr. Collins and there were other people involved, of course, in checking and rechecking.

Q. Under some pressure of time, would you say? A. I would say yes, there was pressure of time involved. There was a certain deadline that had to be met.

Q. Did you, yourself, check the population totals the final day, Mr. Vocelli? A. The way it worked, as I recall, was that in the House I did very little, if any, direct checking against the maps. And as far as the populations go, if I recall correctly, [111] I did some of the districts in terms of checking the populations, which all seemed to square off all right. But these were just on rough drafts. But I only did some of those. Maybe about 50.

Then I was placed on others at the instruction of my then superiors at that point; Mr. Collins, Judge Saden, et cetera. At that point the large part or the lion's share of my work in the last day or two, if I remember correctly, was checking the Senate plan that the Board was to submit against the census maps and, as I said, I had very limited input.

But we checked it to see that it did ndeed what its authors wanted it to do; namely, was the Plan valid in terms of being contiguous and such and were the population figures correct. And so we were basically acting as just mechanics or technicians and, as I also said, I made my few suggestions and in some cases they were followed, in some cases they weren't.

Q. Do you have any recollection of those last few days before filing of the circumstances which produced the apparent non-contiguity in House District 104? A. No, I have none whatsoever because, as I said, we—

Judge Blumenfeld: You have answered it. You know, it's all collateral.

Mr. McCarthy: I will pass that matter. Thank [112] you.

Q. (By Mr. McCarthy) In any of the plans you have devised, either partial or total, Mr. Vocelli, since the conclusion of the Board's doings and the filing of the official reapportionment plan, referring specifically to the plans you have since devised in part and in whole, did you make any political analysis of the consequences of any of those plans? A. I will say that after the fact, after the plans were drawn up and put on these maps, there was some political analysis for my own edification. But I can think of hardly any, if any, instances in which there is any change based on that. I think I can think of one on all of them.

I think the best way to sum that question up is that we had, or at least I can speak for myself, in drawing up these demonstrations we had three top priorities: It goes without saying, the equality; then within those constraints to rigorously reduce the number of towns cut and the excessive segmentation that some other plans or the Board's plan, in my opinion of course only, contains. And then again after those two priorities, to the extent possible, trying to make something that I would feel to be reasonably compact.

Those were the three top priorities and I can think of instances in which in the interests of that, shall we say, the technical superiority of the Plan, I did things that I'm sure would anger quite a few people on both sides of the aisle [113] if we want to turn it into politics. But I can think of very few instances, even though I did make some analyses, I can think of very few, if any, instances in which I made any changes based on the analyses.

Furthermore, never to my knowledge, absolutely never would I unnecessarily segment a town in order to achieve any political results, however much I may like it or dislike it.

Now what I'm saying is, to sum it up, that I did not

operate when I drew up these plans or I participated in their drawing up, I didn't operate on the basis of a preordained political standard of balance. I didn't sit down and say, well, based—

Judge Blumenfield: All right. You have answered it. He wanted to know whether you took political considerations into account and the answer, I guess, is no?

The Witness: Or it was very negligible. I told you in the one or two cases where—

Judge Blumenfield: Okay.

Q. (By Mr. McCarthy) In the work you did with Judge Parskey did you ever devise or present to him any House Plan? A. Yes, there was. First of all, I worked on revisions of the Commission Plan. Then for some reason, I forget just [114] what, it was decided that those were insufficient.

I did devise or present to him a skeleton plan. By a skeleton plan I mean the combinations and such. And that went through various phases.

I think in one phase it was plus or minus 5 per cent, and in yet another it was plus or minus 4 per cent. However, each and every district was not drawn out of that in its entirety. Whatever the reasons, why we weren't instructed to do that, I'm not really sure. But we were working more on the Senate than the House, on the instructions of Judge Parskey.

Q. With respect to the four plans you have subsequently devised, Plaintiffs' Exhibits 20 through 23 inclusive, showing various maximum deviations plus and minus, may I sum up as a fair analysis that town line cuts are inversely proportional to the degree of deviation? A. Yes, I would agree with that. In other words, as you increase the deviation that's allowable the number of towns segments and cut drops and, as you say, it's inversely proportional. Yes.

Q. With respect to Defendants' Exhibit 1, Mr. Vocelli, the so-called Commission Plan, to your knowledge was that ever approved by the full Commission? A. No. To my

knowledge the full Commission, that is, the eight member body, never formally met and approved any [115] plan at all.

Rather, it was apparent that the four senators serving on that Commission had reached, from what I could see, an agreement amongst themselves. But since the House was not met or was not agreed upon, the whole thing fell.

Judge Smith: You mean Defendants' Exhibit A.

Mr. McCarthy: I'm sorry, your Honor. Defendants' Exhibit A.

Q. One final question, if you please. Were any plans before the Board during the Board's period of work and deliberations, were any plans before the Board with smaller deviations maximum than those finally adopted? A. I do recall, this again was just a skeleton plan, a master plan as we call it, that I had given to Judge Parskey and I believe perhaps Judge Saden. I'm not sure. It was a rough master plan which would have had 125 districts and deviations of plus or minus 3 per cent.

Q. That's the plan—excuse me. A. But that was just a sample draft. But the Board, of course, apparently was more interested in 151 and a higher deviation.

Q. And that was a plan that blocked out the state engrossed without final delineation of specific assembly districts? A. That's correct.

Mr. McCarthy: No further questions. Thank you.

[116] Mr. Satter: No questions.

Judge Blumenfeld: How did you happen to draw up a rough plan with 125 districts instead of 151?

The Witness: Well, to tell you the truth, that I think when I actually drew it up it was during the Commission or early in the Commission or the Committee, I'm not sure which—

Judge Blumenfield: Well, it wasn't suggested to you by somebody?

The Witness: No. I just did it on my own.

Judge Blumenfield: All right.

(Witness excused.)

[117] **George Heilpern.**

called as a witness, being first duly sworn, was examined, and testified as follows:

The Clerk: State your name.

The Witness: George Heilpern, H-e-i-l-p-e-r-n, 40 Lexington Road, West Hartford.

Direct Examination

By Mr. Satter:

Q. Mr. Heilpern, you are a photographer? A. I am.

Q. And have you many times testified in court about the introduction of pictures? A. Yes, sir.

Q. At my direction did you go to the boundary line of the Towns of Newington and Farmington and inspect that boundary line? A. I did.

Q. And is that boundary line between those two lines about a thousand feet? A. Measuring the map and looking at it, between 500 and a thousand feet. Slightly under a thousand.

Q. Are there any roads or any means of communication between those two boundaries of Newington and Farmington? A. There is no road east-west in that area.

Q. No road going from Newington to Farmington or Farmington to Newington? [118] A. That is correct.

Q. So to get to either of those towns you have to go through another town, is that correct? A. You would have to go around by some other area.

Q. And what is the terrain in that narrow strip of land? A. Well, Route 71, which goes southerly from Corbin's Corner, goes almost parallel to this boundary and it is on a ridge of land on each side of it, both to the east and the west. It goes down very sharply some thirty, forty, fifty feet and is essentially woodland and swampland. Mostly swampland.

Q. On both sides of the boundary line? A. On both sides.

Q. Did you take some pictures of it? A. I did.

Q. Have you got some pictures showing that boundary line, standing on the boundary line looking into the Town of Newington? A. I have.

Q. Are these pictures a fair representation of the nature of the terrain standing on the boundary line of Newington-Farmington looking into the Town of Newington? A. They are.

Mr. Satter: May I offer them all at this time? [119] I just want to make a very simple quite point.

Any objection?

May I have all of this group marked whatever the number is, A, B, C and D?

Judge Smith: Exhibits 24-A, B, C and D.

(Plaintiffs' Exhibits 24-A through 24-E: Photos of Farmington-Newington line marked full exhibits.)

By Mr. Satter:

Q. Have you similarly, Mr. Heilpern, taken photographs standing on that same boundary between Newington and Farmington looking toward the Town of Farmington? A. I took the pictures of Farmington. I was not standing on the boundary because I had to go across the highway. But it's essentially at the boundary.

Q. And do you have those pictures? A. I have two groups; one of the southerly portion and one of the northerly portion.

Q. Are these an accurate portrayal of the terrain on the boundary line, or virtually on the boundary line between Newington and Farmington looking towards the Town of Farmington? A. They are.

Judge Smith: Is that the area that the shopping center is going into?

The Witness: Immediately south of it, sir.

[120] Mr. Satter: Do you have any objection?

Mr. Beizer: No objection.

Mr. Satter: May they likewise be marked?

Judge Smith: How many are there?

Mr. Satter: I think there are five.
The Clerk: There were five in the first ones, your Honor.
Judge Smith: A, B, C, D and E.

(Plaintiffs' Exhibits 25-A through 25-E: Photos of Farmington-Newington area, marked full exhibits.)

Mr. Satter: No further questions.
Mr. Beizer: No questions.
Mr. McCarthy: Just one.

Cross-Examination

By Mr. McCarthy:

Q. Do you drive a car, Mr. Heilpern? A. Yes, sir.
Q. Ever manage to drive between Newington and Farmington, or vice versa? A. I can't recall whether you can go directly or not.
Q. I didn't ask about directly, thank you. A. Directly?
Q. No. I didn't ask about directly.
Have you ever managed to drive directly or indirectly [121] between Newington and Farmington, or vice versa, over the public roads? A. I would have to look at a map and see the town lines. I don't know.
Mr. McCarthy: No further questions.

(Witness excused.)

Mr. Satter: Mrs. Osborne.

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[122] **Jean Osborne,**

called as a witness, being first duly sworn, was examined, and testified as follows:

The clerk: Will you state your name.
The Witness: Jean Osborne, O-s-b-o-r-n-e.
The Clerk: And where are you from?
The Witness: Ledyard.
Judge Blumenfeld: Osborne?
The Witness: Osborne; O-s-b-o-r-n-e.

Direct Examination

By Mr. Satter:

Q. Mrs. Osborne, you have given your address, I presume? A. Yes.

Q. You live in Ledyard, Connecticut? A. Right.

Q. And are you presently in the Board's 18th district? A. Yes.

Q. And were you in the 18th district prior to the Board's Plan? A. Yes.

Q. What was the margin of victory for the senatorial candidates in the 1966 election? Do you remember? A. In 1966? Roughly 372 plurality. And that was the first year it was.

Q. And how about 1962? A. A little bit less; 280, something like that.

Q. And in those two instances it went Democratic? [123] A. It went Democratic.

Q. Do you know what the approximate number of people in that district were? A. In the entire 18th district?

Q. Yes. A. The population of it?

Q. Yes. A. 85,5. May I look and give you—

Q. Approximately 85,000? A. 85,500, right.

Q. And the plurality in 1966 had been about a hundred or so and in 1968 by a couple hundred? A. 1966 by almost 400. I'm sorry.

Q. And in '68 by? A. Almost 300.

Q. Of a district of 85,000? A. That's right.

Q. And in 1970 who won that district? A. The Republican.

Q. And what was the margin of victory? A. 116 votes.

Q. 116 votes? A. I know that exactly.

Q. So it is fair to say that in the three previous elections that was a very swing district? [124] A. Very much so always.

Q. And a very close district? A. Yes.

Q. Now, you have heard testimony to the effect that this district under the Board Plan, the 18th district under the Board Plan has been constructed by taking out the Town of Griswold and putting in a portion of the Town of Norwich? A. Yes.

Q. What do you believe would be the consequences—excuse me. I will withdraw the question.

Are you a Democratic State Committeewoman? A. Yes, I am.

Q. State Central Committeewoman? A. Yes, I am.

Q. In the 18th district? A. Yes.

Q. And are you familiar with the votes in those areas? A. Yes. Very much so.

Q. And are you familiar with the voting records of the towns in those areas? A. Yes, yes.

Q. And what has been the history of Griswold? What has been the voting record of Griswold? A. It has been, in a predominantly Republican area, the so-called shining light for the Democrats; they have a [125] majority of Democrats of approximately 10 to 1 registration.

Judge Blumenfeld: In Griswold you are talking about?

The Witness: Griswold, right. About a 10 to 1 Democratic registration. And we have usually looked for a 12 to 1400 plurality out of Griswold.

Q. (By Mr. Satter) And by the inclusion of Griswold into the 18th Senatorial District—excuse me. I withdraw that question.

By excluding Griswold from the Senatorial 18th District and the inclusion of that southern section of Norwich, what do you believe the net effect of that would be in terms of turning that district from a swing district into something else? A. I don't see how we'd have a chance of ever electing a Democrat in the 18th District again.

Q. As a consequence of this change? A. Absolutely.

Q. It turns it from a swing district into a solid Republican district? A. Yes, as far as we can determine.

Judge Smith: Is there really any dispute on the facts as to whether the Board did attempt to use the so-called fairness of principle in laying out its House Plan so that it would reflect as fairly [126] as possible the proportion of votes over the last three elections in the House makeup?

Mr. McCarthy: Not for myself, your Honor.

Mr. Satter: In terms of the way it is expressed in the depositions by Collins and Saden, we don't dispute that. In fact, we shall argue from it, as you will soon hear.

Judge Smith: Do we need testimony on it?

Mr. Satter: I'm not going to put any more evidence on. That's it, as far as we are concerned. That was only to show an instance of what the consequences were.

That's the end of my testimony. As a matter of fact, we are going to rest, except for one thing about getting the depositions in. This is the end of it.

Judge Blumenfeld: Is there any cross-examination of Mrs. Osborne?

Mr. McCarthy: No, your Honor.

Judge Blumenfeld: You may step down.

(Witness excused.)

Mr. Satter: Your Honor, then we would, I understand by agreement of parties, introduce the pretrial deposition of Mr. Saden and Mr. Collins.

Is that correct?

[127] Mr. McCarthy: That is correct.

Mr. Satter: Now, I think the Court must have the originals of these. Isn't that correct?

Judge Smith: We had copies of some excerpts.

Mr. Satter: Excerpts. But the original should be in a court.

I specifically asked the reporter to have them submitted because we all had this as part of our plaintiffs' brief.

If they are admitted as exhibits, that, then, would terminate our case.

Judge Smith: They may be admitted and marked, when you find them, Exhibits 26 and 27.

(Plaintiffs' Exhibit 26: Deposition of Judge Saden, to be marked full exhibit.)

(Plaintiffs' Exhibit 27: Deposition of James Collins, to be marked full exhibit.)

Mr. Satter: Unless the Court wants an extra copy. Would your Honors want—

Judge Blumenfeld: We have copies.

Mr. Satter: Those are only parts.

Mr. McCarthy: I have an unmarked pair. They are my only pair.

Mr. Satter: I don't think that's fair.

Judge Blumenfeld: We will find them.

[128] Mr. Satter: They are available, I'm sure.

Mr. McCarthy: They may be in New Haven.

Judge Blumenfeld: Possibly.

Is there any question about these excerpts that have been furnished to the Court?

Mr. Satter: Those are just excerpts. They don't mean anything. They are just photostats.

You have a right to see the whole thing. These are, obviously, excerpts.

Judge Blumenfeld: All right.

Judge Smith: Plaintiffs rest?

Mr. Satter: Your Honor, this plaintiff rests.

Mr. Beizer: Intervener plaintiff rests as well, your Honor.

Mr. McCarthy: We have been discussing whether to proceed, your Honor.

I would like to produce briefly Judge Saden as a witness. I think his comments will be relevant to some of the testimony we have heard this morning.

[129] **George A. Saden,**

called as a witness, being first duly sworn, was examined, and testified as follows:

The Clerk: Will you state your name.

The Witness: George A. Saden, S-a-d-e-n.

The Clerk: Where are you from, sir?

The Witness: Bridgeport, Connecticut.

Direct Examination by Mr. McCarthy:

Q. Judge Saden, functioning as a member of the Reapportionment Board your deposition includes certain testimony with respect to your guidelines in the composition of the Board Plan. And I do not propose to rehearse that. I would simply draw your attention to Judge Parskey's testimony in proceedings this morning with respect to a 1 per cent Senate deviation and a 4 per cent House deviation.

Will you give us your views on those expressions, please?

Mr. Satter: I object to the form of the question.

Mr. McCarthy: All right. I'll rephrase it.

Q. Did you hear Judge Parskey's testimony this morning with respect to a 1 per cent Senate and a 4 per cent House deviation? A. Yes.

Q. Would you care to express your views?

[130] Mr. Satter: I object to the form of the question.

Judge Smith: Sustained.

Mr. McCarthy: I'll rephrase it.

Q. What were your views, your guidelines in the composition of the Board Plan with respect to potential deviations in the Senate and House Plans? A. My views and my instructions to Mr. Collins was to keep the deviations as low as possible in both houses. I fixed no particular figures for either house. Contrary to testimony this morning, there was no understanding by the Board that we would have any 1 per cent deviation factor in the Senate or a 4 per cent deviation in the House.

The deviation factors didn't come into the picture until after I had submitted, in the first instance, a Senate Plan

which had been worked out into deviations. And that plan came out to a deviation factor of less than 1 per cent maximum and minimum.

But there was no preconceived or prejudged deviation factor decided upon by myself or by the Board.

Mr. McCarthy: One moment, if your Honors please.

May I ask the Court whether you would like to hear anything from Judge Saden with respect to the issue of drop population in Enfield, Fairfield and Bristol, or with respect to the alleged non-contiguity [131] of Assembly District 104 in Ansonia?

If I understood the thrust of your Honors' comments this morning, you would choose not to hear any more testimony in those particulars?

Judge Blumenfeld: On the drop population I guess that is so. That is before the state court, you say, for correction in a proceeding there.

Mr. McCarthy: It is indeed, your Honor.

Judge Blumenfeld: Yes. So I don't think we are interested in that.

Mr. McCarthy: And the same with respect to the alleged non-contiguity of Assembly District 104.

Judge Blumenfeld: No.

Mr. McCarthy: All right.

I have no further questions.

Mr. Satter: No questions.

Mr. Beizer: No questions.

By Judge Blumenfeld:

Q. Judge, I am reading part of your deposition here and I am not sure that your testimony is clarified, but it seems what you said—have you looked at this lately? A. No, I haven't seen it since I was deposed.

Judge Blumenfeld: I think perhaps you ought to have a copy of it.

[132] Has somebody got the excerpt of the deposition of Judge Saden?

Mr. McCarthy: I have the full deposition.

Q. (By Judge Blumenfeld) On Pages 24 and 25 there is some testimony of yours at this deposition. A. Yes.

Q. Do you recall this? A. Yes.

Well, I would have gone on to give substantially, I think, the same answer as is contained here about the criterion that I was using in trying to devise plans for these two houses.

Q. Do I understand that you recognized the constitutional command to apportion districts so that to apply as nearly as possible the rule that one man has one vote? A. Yes.

Q. But at the same time you were working out a plan that would reflect what you called a corollary to that, so that the corollary being that the final composition of the legislature and the house would correspond in political affiliation to that of the voters as a whole throughout the state? A. Well, if I may elucidate just a bit.

Q. Yes. A. I recognized the controlling factors, the one man-one [133] vote of the Reynolds v. Sims case.

A secondary factor was the attempt in the House to minimize, within reasonable limitations, the number of town cuts or segmentations, as you may say.

And third I thought that as a corollary of the one man-one vote principle a plan that would be fair would be one that would react as closely as possible in the composition of the respective House or Senate to the actual plurality of vote on the House or Senate lines in a given election.

Q. You mean state-wide? A. State-wide. And for that reason when these plans were formulated I did look back at the election results in '66, '68 and '70 to see how these plans would work out. And as we worked them out based on the election results, where you had a split town you couldn't get accurate votes because the voting districts didn't fall that way. So you had to take an arb trary estimate.

Q. You had to get hold of somebody who knew what the situation was in the town? A. Well, I didn't want to do

that because you depend upon subjective elements. So in all cases of split towns I took a proportional arbitration factor depending upon the number of people going into a district, taking a percentage of the overall plurality or the overall vote for one side or the other and figuring that as an element in determining whether [134] that town went Republican or went Democratic.

Q. In applying this corollary to the doctrine of fairness, is that what caused some of these districts to come out in what have been described as unusual shapes or shapes that deviate from normal? A. In some instances that may have occurred. I do think that you—and I think in the deposition I point out the extreme factor where it is conceivable that you could have, in an extreme example, every district in the state won by one vote. So that one party would have all the representation in both houses. Whereas, a very substantial minority would be completely unrepresented because they had lost by the two vote margin.

Q. I don't want to oversimplify this, but in effect what you were doing was establishing the principle of proportional representation on a statewide basis? A. Within very broad limitations.

Q. But that was one of the factors— A. One of the factors.

Q. —which entered into this final Plan? A. Yes, it was.

And the fact is, your Honor, that when you test these plans against the '66 and '68 results you will find that the Democrats would have won in both years as they should have because they won the plurality of the votes in both houses in [135] both years.

Q. Then that is sort of a tribute to the fidelity with which you applied your own theory in arriving at these district lines? A. If you may say so.

Judge Blumenfeld: All right.

Judge Smith: Thank you.

Judge Zampano: Thank you.

(Witness excused.)

Mr. McCarthy: The only further evidence I have, your Honor, is to offer a certified copy of the state court proceedings in pursuit of the first defense of intervenor's answer.

Your Honor, while Mr. Cannon is reviewing the state court record may I recall Judge Saden for one more question, if you please, which I think may amplify the record?

Judge Blumenfeld: Okay.

[136] **George Saden,**

recalled as a witness, having been previously duly sworn, was further examined, and testified as follows:

By Mr. McCarthy:

Q. Judge Saden, with respect to the deviations of the Board Plan which was adopted, have you seen any complete plans before that with lesser deviations? A. No, I had not.

Mr. McCarthy: Thank you.

That's all, your Honors.

(Witness excused.)

Mr. Cannon: No objection.

Judge Blumenfeld: Does the state have any evidence?

Mr. Cannon: No, your Honor.

Mr. McCarthy: If your Honors' please, I have perhaps one relevant supplement to the state court record, which is not certified because it entails subsequent developments.

I had the certification made up as late as possible, but we have some more developments.

Judge Blumenfeld: What is it about?

Mr. McCarthy: Well, let me state what it is.

Judge Smith: This one may be marked Defendants' Exhibit B.

[137] (Defendants' Exhibit B: State court record, marked full exhibit.)

Mr. McCarthy: This exhibit simply purports to show some subsequent developments to the state court file certification.

The most relevant of which is to notice pleadings by interveners in Wethersfield, additional appearances by the Attorney General for the Comptroller and Treasurer and a pleading and motion for more specific statement on behalf of parties in the Town of Killingly.

Judge Blumenfeld: I take it there is no objection to this, Mr. Satter?

Mr. Satter: No objection.

Mr. Cannon: I object to the correspondence that he's got attached to it.

Mr. McCarthy: All right. Strip off the correspondence.

Judge Smith: Defendants' Exhibit C, minus the correspondence.

(Defendants' Exhibit C: Additional pleadings, marked full exhibit.)

Mr. McCarthy: The intervening defendant rests, your Honor.

[Arguments of Counsel, pages 138-196, omitted.]

District Court Opinion and Judgment, Notation Where Found in Jurisdiction Statement

[The Memorandum of Decision of the District Court in *Cummings et al., and Aronie et al.* v. *Meskill et al. and Gaffney*, reported at 341 F. Supp. 139 (D. Conn. 1972), is printed in the Appendix to appellant's Jurisdictional Statement in *Gaffney* v. *Cummings*, 71-1476, at pages 1a to 12a. The Judgment of the District Court in the same cause is printed in the Jurisdictional Statement at pages 13a-14a.]

Notice of Appeal to the Supreme Court of the United States. Notation Where Found in Jurisdictional Statement

[The Notice of Appeal to the Supreme Court of the United States is set forth in the Jurisdictional Statement at pages 15a-16a.]

SUPREME COURT OF THE UNITED STATES

Appellant's Motion for Expedited Consideration Denied by the Supreme Court of the United States

[Caption Omitted]

[May 22, 1972]

Motion of appellant to expedite consideration denied. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join in denying expedited consideration on the merits but would invite appellant to file an appropriate motion for a stay.

[Reported at 406 U.S. 942.]

Appellant's Application for a Stay Granted by the Supreme Court of the United States

[Caption Omitted]

[June 12, 1972]

Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted. MR. JUSTICE STEWART would deny the application.

MR. JUSTICE DOUGLAS, dissenting.

[Dissenting opinion omitted.]

[Reported at 407 U.S. 902.]

Order of the Supreme Court of the United States Noting Probable Jurisdiction

[Caption Omitted]

[October 10, 1972]

In this case probable jurisdiction is noted.

MOTION

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Dixon, "The Warren Court Crusade for the Holy Grail of 'One Man-One Vote'," *The Supreme Court Review*, U. Chic. L.R. (1969) 29

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Hacker, *Congressional Districting* (1964) 19

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McKay, "The Reapportionment Decisions, Retrospect and Prospect", 51 Am. Bar J. 128 (1965) 11, 19

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1476

J. BRIAN GAFFNEY,

Appellant,

v.

THEODORE R. CUMMINGS, et al., NANCY ARONIE, et al., and THOMAS J. MESKILL, Governor of the State of Connecticut, et al.,

Appellees.

MOTION OF APPELLEES THEODORE R. CUMMINGS, ET AL, TO AFFIRM

Appellees Theodore R. Cummings, et al (hereinafter referred to as "Plaintiffs") move pursuant to Rule 16 of the Rules of the Supreme Court of the United States that the judgment of the District Court be affirmed on the ground that the questions presented on appeal are not so substantial as to warrant further argument.

Statement

This is a direct appeal from a judgment dated April 4, 1972 of the United States District Court, District of Connecticut, sitting as a three-judge Court. The judgment declares unconstitutional a Reapportionment Plan (hereinafter referred to as the "Plan" or "Board Plan") districting

the Connecticut State Legislature consisting of its Senate and its House of Representatives, submitted on September 30, 1971 by a Reapportionment Board (hereinafter referred to as the "Board"). The judgment further enjoins the Governor, Thomas J. Meskill, and other officers of the State of Connecticut from implementing said Plan. The District Court retained jurisdiction and appointed Robert H. Bork, Esq., a professor of constitutional law at Yale University, as Special Master to formulate and submit a plan of reapportionment conforming with the Court's opinion.

The Board Plan is characterized by a population deviation among the districts in the House ranging from a high of 3.93 % above the ideal to a low of 3.90% below the ideal or a total deviation of 7.83%. It was the admitted product of political structuring by the Board to assure that each political party elected the number of its candidates to each house of the Legislature in proportion to the total vote all of its party candidates received in all the district elections.

Special Master Bork filed his proposed reapportionment plan and his report with the District Court on May 26, 1972 (a copy of his report is annexed to the Plaintiffs' Memorandum in Opposition to Appellant's Motion for Stay submitted to this Court). On June 9, 1972, the District Court heard all interested parties on the Special Master's Plan and it is anticipated the Court will approve said plan and order its prompt and expeditious implementation.

Summary of Argument

The District Court faithfully followed the leading cases of this Court on legislative reapportionment and its decision is justified by both the evidence and the law.

The District Court applied the standard that "deviations from absolute numerical equality which are more than minimal may not be allowed unless they are . . . the unavoidable results of attempts to obtain precise equality" (Mem. of Dec. App. p. 9a). Essentially this is the same as the standard enunciated by this Court, that districts shall be "as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Swann* v. *Adams*, 385 U.S. 440 (1967); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

The District Court found that the House districts in the Board Plan deviated from the perfect average by a maximum of plus 3.93%, and by a minimum of minus 3.90%, for a total deviation of 7.83%. It concluded that these deviations did not meet the constitutional standard. The evidence in this case justified this finding. A reapportionment plan, submitted to the Court, for the House with the same number of seats as the Board Plan and based upon the same census material as available to the Board, demonstrated that the deviations could be reduced to plus 1.6% above the ideal and minus 1.01% below the ideal for a total deviation of 2.61% (Pl. Ex. 23, Transc. pp. 77-78, 85-87).

Of the three explanations offered by the architects of the Plan, political structuring was clearly the dominant cause for the excessive deviations: (1) The census data explanation was not convincing because Plaintiffs' Exhibit 23 conclusively showed that, based upon this same census information, the House deviations could be reduced from 7.83% in the Board Plan to 2.61%; (2) The desire to minimize

town line cuts was not convincing because the expressed operating principle of the Board was that once it had to cut some town lines, it was not restrained in how many it did cut; (3) The Board's obsession with politically structuring the districts to assure that each political party elected the number of its candidates to each house of the Legislature in proportion to each party's total of the votes all its candidates received in all individual district elections, dominated the Board's decision making. It was applied in the creation of each and every legislative district. The chief author of the Plan asserted that political structuring effectuated the true meaning of the one man-one vote doctrine.

The District Court therefore found that political structuring was "a substantial cause of the numerical deviations of the Board Plan" (Memo. of Dec. App. p. 11a) and that "if partisan political balancing were eliminated a closer approach to perfect equality could be achieved with the materials at hand" (Id., App. p. 7a).

The District Court then held that political structuring was not a legitimate state interest or rational policy that could justify the deviations. The lower Court was totally warranted in this holding.

Political structuring is nothing less than political gerrymandering, which is defined by Justice Fortas as "deliberate and arbitrary distortion of district boundaries and population for partisan or personal political purposes" (*Kirkpatrick* at p. 538).

When in *Kirkpatrick* this Court was squarely asked to justify deviations on the basis of "political practicality", it resoundingly responded that "problems created by partisan politics cannot justify apportionment which does not otherwise pass constitutional muster" (*Kirkpatrick* at p. 533).

Further reasons, based upon the evidence of this case, for holding that political structuring is not a rational policy are:

(1) Political structuring caused an increase in the number of town lines cut in violation of the Connecticut State Constitution and obviously, a rational state policy cannot be one which breaches the State's own constitution.

(2) It caused the bizarre and peculiar shapes of the districts.

(3) By purposefully creating safe districts, political structuring invidiously discriminated against those individual voters who were deliberately placed in the sure district of the opposing political party, and as a result of that design, denied "the individual and personal" (*Reynolds* at p. 561) right to an effective vote and to effective political action within that district.

(4) By endeavoring to control the outcome of legislative elections, political structuring destroyed the very essence of voting by depriving a voter of the power of determination.

The justification urged by the appellant that political structuring will prevent "minority government" is both without merit and not demonstrated by the facts.

The Plan is not the product of a deliberative bi-partisan apportionment board acting non-politically. The evidence reveals that the Board functioned as a one-man operation of Judge Saden assisted by his counsel, Mr. Collins. There were no meetings whatsoever by the Board on the House Plan and it never met as a Board to approve the entire Plan. The tie-breaking member was handed the product of Judge Saden on the last day of the constitutional deadline and he had no choice but to accept it. The Board, under the facts of this case, is not entitled to a presumption of fairness and the criteria for determining the constitutionality of its handiwork must be the same as applied in *Reynolds, Swann and Kirkpatrick.*

If this Court reinterprets its prior decisions so as not to require that districts be as nearly equal as practicable, then this Court should apply the Supremacy Clause to allow deviations higher than in the Board Plan in order to give the maximum feasible effect to the valid state policy, expressed in the Connecticut State Constitution, of preserving town lines. Such an interpretation by this Court is particularly justifiable in Connecticut where towns perform important state functions and where, as a result of the prevalence of town meetings, the citizens of each town are organized into active and functioning political units. Permitting a larger number of legislative districts to coincide with town lines will contribute to more effective representation.

ARGUMENT

I.

The Board plan of apportionment fails to meet the constitutional mandate that legislative districts must be "as nearly of equal population as is practicable".

Throughout his brief appellant urges upon this Court that some concept other than equality of population ought to be the standard by which a legislative plan of apportionment should be judged. He calls for "equality of political opportunity" (Appellant's Brief, p. 18) in one instance and in another for "substantial equality of district population yielding some room for adjustment to other representation customs and values" (*Id.* at p. 29). This argument is characteristic of one who thinks in terms of the voting interests of institutions, whether they be political, governmental, economic, partisan or social, rather than in terms of the voting rights of individuals. This approach is perhaps natural for appellant who, in his capacity as State Chairman of one of the major political parties in the State

of Connecticut, might tend to think of people as blocks of votes rather than in their roles as individual citizens of that State. However, simply stated, the standard established by the Equal Protection Clause of the Constitution and by this Court for legislative apportionment is that the districts must be "as nearly equal as is practicable".

That is the standard which was applied by the District Court in holding that the plan of apportionment created by the Connecticut Apportionment Board failed to meet constitutional limitations on deviations from numerical equality. The District Court said:

> "The constitutional principle of the vote cases appears to be that deviations from absolute numerical equality which are more than minimal may not be allowed unless they are . . . the unavoidable results of some attempts to obtain precise equality . . ." (Mem. of Dec., App. p. 9a).

Ever since *Baker* v. *Carr*, 369 U.S. 186 (1962), opened the way to judicial scrutiny of the structuring of our legislative bodies, population, as measured by individual citizens, has been the touchstone against which all apportionment plans have been tested. As Chief Justice Warren said in *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964):

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or economic interests. As long as ours is a representative form of government and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."

Since formulating the basic concept of one man-one vote in *Gray* v. *Sanders*, 372 U.S. 368 (1963), this Court has without variation held that equality of population must be

the cornerstone of any plan of apportionment. In *Wesberry* v. *Sanders*, 376 U.S. 1, 7 (1964), the Court held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's". This same standard was applied to state legislative plans of apportionment in *Reynolds* v. *Sims*, *supra*. Interestingly enough, while *Reynolds* is frequently cited for the proposition that one man-one vote really translates into "substantial equality", the precise holding of the case was as follows:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable.*" (Emphasis added.) *Id.* at p. 577.

As the proliferation of reapportionment cases has developed a more sophisticated body of law, it has become more and more apparent that the primary concern of the courts, both state and federal at every level, has been to preserve the integrity of an individual's vote against attacks from various interest groups. Thus in *Swann* v. *Adams*, 385 U.S. 440 (1967), the Court held that the burden was upon the proponent of a plan to "articulate acceptable reasons for variations among the populations of the various districts" especially when the opponents of such a plan had placed before the court their own plan which revealed smaller population deviances. 385 U.S. at 445. Then in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), the Court invalidated a Missouri congressional redistricting plan which had a deviation that ran from a high of 3.13% to a low of 2.84% on the ground that the State of Missouri had not satisfactorily justified the population variations among the districts.

What is clear from the mainstream of holdings by this Court is that there is *no de minimis* approach to reapportionment. In *Kirkpatrick* the state had urged the Court to uphold the plan on the theory that the variations were *de minimis*. This Court rejected that suggestion and held that the State "must justify each variance, no matter how small", saying:

> "There are other reasons for rejecting the *de minimis* approach. We can see no non-arbitrary way to pick a cutoff point at which population variances suddenly become *de minimis*. Moreover to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable." 394 U.S. at 531.

Or as the Court said in *Reynolds*, at 578:

> "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of that case."

In other words, there is no arbitrary percentage of deviation from numerical equality which is, in and of itself, acceptable.

As a corollary to this rule, since there is no arbitrarily acceptable percentage of deviation, then there is no arbitrary point at which the burden of proof shifts to the challenger of a plan of apportionment to prove that the deviation is impermissible. As was noted above, the burden in every case is on the state to "justify each variance, no matter how small". *Kirkpatrick* v. *Preisler, supra,* 394 U.S. at 531; *Wells* v. *Rockefeller,* 394 U.S. 542, 544 (1969); *Swann* v. *Adams, supra,* 385 U.S. at 443-444.

Appellant, rather cavalierly, asserts that in this case the burden should shift to the plaintiffs to prove the unfairness of the deviation from numerical equality. For this

claim, he relies essentially on *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) (Appellant's Brief, pp. 30-33). However, this reliance is clearly inappropriate as applied to the facts of this case.

In the first place, *Whitcomb* dealt with multimember legislative districts which are themselves *sui generis* and have been treated by this Court as such. See *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 731 (1964); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966). The Court has clearly held that where multimember districts exist, in order to invalidate the plan creating them, it must be shown that they unconstitutionally operated or were designed to "minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U.S. at 439. So by their very nature the proof in cases dealing with multimember districts involves proof of subjective discrimination rather than the objective numerical deficiencies that are evident in single member districts.

Secondly, the plaintiff in *Whitcomb alleged* invidious racial discrimination against the Negro voters in Marion County, Indiana. Having made such an allegation the plaintiff in that case assumed for himself the burden of proving the invidious discrimination that he alleged. This he could not do. In the instant case, the evidence revealed invidious discrimination against Connecticut citizens as individuals resulting from the Board's political structuring technique (See Point II of this Brief, *infra* pp. 18-22), but the District Court in its Memorandum of Decision did not find it necessary to decide the case on the question of political gerrymandering, and in this brief, the plaintiffs do not assert it as an independent ground for affirmance.

Finally, in *Whitcomb* the Court found, and indeed the plaintiff in that case conceded, that the plan of apportionment under attack was not "*designed* to dilute the vote of

minorities", 403 U.S. 149. In the present case, however, the architects of the plan themselves admit, inded boast, that a fundamental purpose running throughout the entire plan was to achieve a preconceived and preprogrammed political result. It was the single most determinative factor in ferretting out the partisan votes that would fulfill the predetermined political result.

The ultimate proof of the validity of this Court's consistent position that equality of population must be the basis for apportionment *is that it works.* After all the thrashing, resistance and acrimony are set aside, and the responsible individuals throughout the several states get down to the business of redistricting themselves in accordance with the mandates of the Constitution and of this Court, it is becoming more and more apparent that the states are able to create legislative districts that are "as nearly of equal population as is practicable". *Reynolds* at 577. This Court noted in *Kirkpatrick,* when referring to the New York apportionment plan considered in the companion case of *Wells* v. *Rockefeller,* 394 U.S. 542 (1969), that the New York regions were divided into districts of almost absolute population equality, which was to this Court "striking evidence that a state legislature which tries can achieve almost complete equality among all the State's districts" (p. 532).

In fact, since *Reynolds,*[1] and particularly since *Kirkpatrick,* the efforts to achieve complete numerical equality throughout this country here been remarkably successful. As of May 16, 1972, 11 of the 50 states had created senate plans with a deviation lower than the 1.81% of the Board

[1] After the *Reynolds* decision Professor Robert McKay observed that ". . . the lower federal courts, the state courts and even the state legislatures moved with almost surprising alacrity toward good faith compliance." McKay, "The Reapportionment Decisions, Retrospect and Prospect", 51 Am. Bar J. 128, 131 (1965).

Plan and 19 of the 50 states had drawn house plans with deviations lower than the 7.83% of the Board Plan.[2]

The District Court found that the House districts in the Board Plan deviated from the perfect average by a maximum of plus 3.93% and by a minimum of minus 3.90%, for a total deviation of 7.83%. It concluded that these deviations did not meet the constitutional standard. The evidence in this case justified this finding. A reapportionment plan, submitted to the Court, for the House with the same number of seats as the Board Plan and based upon the same census material as available to the Board, demonstrated that the deviations could be reduced to plus 1.6% above the ideal and minus 1.01% below the ideal for a total deviation of 2.61% (Pl. Ex. 23, Transc. pp. 77-78, 85-87).[3]

On May 26, 1972, the Special Master, appointed by the District Court to prepare a substitute plan of apportionment for the plan struck down, filed a plan with the court which

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[2] Book of the States, 1972 Edition, See tabulation of State apportionment plans, annexed to Plaintiffs Memorandum in Opposition to Stay, submitted to this Court.

[3] On the issue of the Board's Senate Plan no evidence of lower deviations was adduced, but the Court was correct in declaring the entire Plan unconstitutional when the deviations in one house did not meet the requisite standard. It was following the rule of this Court that "a court in reviewing an apportionment plan must consider the scheme as a whole." *Burns* v. *Richardson*, 389 U.S. 73, 83 (1966). The District Court was then also able to follow the direction of this Court of imposing upon the Special Master the responsibility of developing a plan of apportionment "on an overall basis." (*Id.* p. 83.) In accord is *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964).

The District Court was particularly warranted in so acting in light of its finding that the boundary lines of house districts did not mesh with the boundary lines of senatorial districts. (Memo. of Dec., App. p. 5a.)

The Special Master's plan corrects this situation and achieves significant administrative convenience by pyramiding four house districts within each of the 36 senatorial districts.

achieves virtual mathematical equality. No senate district in the Master's plan deviates from numerical equality by more than 1%. No house district displays a deviation of as much as 1.2% from perfect equality, the largest being 1.16%.[4]

So it can be done. As the Special Master said in his report, "an honest and good faith effort has been made to construct districts, in both houses of the legislature, as nearly of equal population as is practicable." He has achieved the mandate of this Court and, by casting aside the partisan political concerns that permeated the Board Plan, has fulfilled the task which the plan under consideration failed to do, that is, of insuring that in Connecticut no man's vote in any one district will be accorded more weight than that of one in any other district.

II.

The Board's political structuring of the legislative districts substantially caused the population deviations and is not a rational state policy that can justify such deviations.

The District Court found that the "partisan political structuring" employed by the Board was, "a substantial cause of the numerical deviations of the Board Plan" (Mem. of Dec., App. p. 11a), and that, "If partisan political balancing were eliminated as a factor, a closer approach to perfect equality could be achieved with the materials at hand" (id., App. p. 7a).

The Court held that, "political gerrymandering cannot be approved as a legitimate reason for violating the requirement of numerical equality of population in districting . . . No legislative or constitutional enactment provides any

[4] Report of Special Master, May 26, 1972.

basis for it or authorizes it. No compelling state necessity for it is demonstrated. The Supreme Court plainly would not approve the partisan political structuring . . ." (id., App. p. 11a).

The Court then concluded that, "the deviations from equality of population of the Senate and the House districts are not justified by any sufficient state interest and that the Plan denies equal protection of the law to voters in the districts of greater population in violation of the Fourteenth Amendment to the Constitution of the United States" (id., App. p. 8a).

The findings of the Court and its holdings are justified by the evidence in this case and by the law.

A. The evidence establishes that political structuring caused the population deviation.

The Board's Plan for the districting of the House had a total deviation of 7.83%.

The principal architects of the Plan, Judge Saden and Mr. Collins, offered three explanations for this deviation: (1) the nature of the census data available; (2) the political structuring utilized by the Board to assure that each political party elected the number of its candidates to each house of the Legislature in proportion to each party's total of the votes all of its candidates received in all the individual district elections; and (3) minimization of cutting of town lines.

The total evidence in this case clearly establishes that the most significant factor, which supervened all others, and which caused the deviation among the districts, was the application of the political structuring principle.

Clearly the census data did not cause the gross deviation in the Board Plan of 7.83%. Plaintiffs submitted a

plan for House districts based upon the census data available to the Board in which the deviation did not exceed a high of 1.6% above the ideal and a low of 1.01% below the ideal or a total deviation from the largest to the smallest of 2.61% (Pl. Ex. 23, Transc. pp. 77-78, 85-87). That the District Court gave credence to the plaintiffs' 1% plan as a valid demonstration of what it purported to achieve is indicated by the Court specifically referring in its opinion to Plaintiffs' Exhibit 23 (Mem. Dec., App. p. 7a). The appellant also conceded its validity by introducing no evidence to contradict it.

The Special Master's Plan, filed on May 19, 1972, keeps deviations in the House below 1% and further validates the fact that census data was not the cause of the higher deviations of the Board Plan.[5]

Likewise the minimization of town line cuts was not a significant factor in the creation of the Plan. Judge Parskey, one of the members of the Reapportionment Board, testified that the operating principle of the Board was: "That once town lines were cut, from then on it didn't make any difference."[6]

Judge Parskey further testified that he raised very serious objections to the manner in which the various towns were cut.

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[5] The Special Master may have used slightly more refined census data than available to the Board. It only accounts for his ability to get the deviations below those in Plaintiffs' Exhibit 23.

[6] His exact testimony was:

> "Q. Was there a fundamental working principle, even if it hadn't been discussed, on the basis of how you dealt with the cutting of town lines in order to comply with the Federal constitutional requirements? A. Well, yes. The impression I had was that the operating principle was that once the town lines were cut, from then on it didn't make any difference" (Transc. p. 10).

> "Well there didn't seem to be any particular need for promiscuous cutting. It made no sense from a population point of view to have these cuts made. So that if the only criterion was to keep within the 1% or the 4%, it wasn't necessary to do that for the purposes of these cuts" (Transc. p. 15).

Mr. Vocelli, who was a member of the staff of the Reapportionment Board, also testified that he had "the impression that once it became clear and obvious there would have to be some violation of the State prohibition against town cuts, I got the impression that after that concern about the integrity of the town lines diminished to virtually nothing" (Transc. p. 94).

Turning to the political structuring explanation, Mr. Collins testified that when there was a choice in the development of assembly districts between preserving town lines and achieving what he called political balance, he always chose the second objective (Pl. Ex. 27, Collins Dep. pp. 30-31).

Both Judge Saden and Mr. Collins testified that the political structuring principle was pervasively utilized in the development of the Plan. Judge Saden said it was applied in the creation of each and every senatorial and house district throughout the entire state.[7]

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[7] Judge Saden testified:

> "Q. And did you in fact plug in the election results for all three years, '66, '68 and '70 *into each and every newly created senate district and house district?* (emphasis added) A. I did as far as you could . . ." (Pl. Ex. 26, Saden Dep. pp. 29, 80)

Mr. Collins testified in his deposition that political considerations were applied in the formation of assembly districts throughout the entire state.[8]

Judge Saden, in fact, went even further and asserted that his dominant concern was to comply with the one man, one vote doctrine in the development of the Plan and this necessarily *required* his utilization of political structuring because it carried into effect the true meaning of that doctrine.[9]

When the District Court was presented with the overwhelming evidence that the authors of the Board Plan gave only three explanations for the deviations; that of these, the census data explanation was not valid because the census data permitted a maximum deviation of 2.61% as opposed to the Board's deviation of 7.83%; that the minimization of town lines explanation was not valid because the testimony revealed that the operating principle of the Board was that once the town lines had to be cut, it did not make any difference how many were cut; and that the third explanation of party political structuring was pervasively

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[8] Mr. Collins testified:

"Q. So that political consideration then did go into the formation of Assembly Districts 18, 19, and 20? A. Absolutely. Absolutely. *Throughout the state this was true.*" (Pl. Ex. 27, Collins Dep. p. 39) (emphasis added)

[9] Judge Saden testified:

". . . if you concede as you must the one man, one vote principle is one to create an equal protection of the law is a just result for every man's vote it seems to me that a corollary to that as I explained to you before is the propos[i]tion that if you don't get some kind—if you don't make any effort to get some kind of equal representation in the General Assembly in both Houses based upon the kind of total vote you are getting for those Houses you are thereby to that extent depriving the efficacy of that one man, one vote principle because you're denying minority groups as full a voice as they would otherwise be entitled to." (Pl. Ex. 26, Saden Dep. p. 96)

applied and was the dominating factor in the development of the Plan; the lower Court was completely warranted in finding that partisan political structuring was a substantial cause of the deviations of the Board Plan.

B. Political structuring is political gerrymandering, which while this Court has not always invalidated, it has never encouraged.

In order to cover up and even sweeten the true nature of the Board's practice and objectives, appellant used a number of fancy names. From time to time they called the engineering of legislative districts an application of "the political balance principle," or consideration of "political fairness," or assuring "equality of political opportunity." Appellant sought to avoid the pejorative connotation of political gerrymandering by claiming none of this engineering was done to achieve a political advantage. But the names used cannot hide the fundamental fact that the maneuvering of legislative district lines for political purposes is political gerrymandering. That is the definition widely accepted.

Justice Fortas in *Kirkpatrick* (p. 538) defines gerrymandering as the "deliberate and arbitrary distortion of district boundaries and population for partisan or personal political purposes." [10]

Normally gerrymandering is confined to the redesign of a limited number of districts for political purposes. However, the political structuring applied in the Plan was of a more sophisticated variety and was more pernicious because it sought to accomplish a desired political purpose throughout the entire state.

Each political party obviously has major areas of political strength throughout the State where its candidates win

[10] See also Edwards, "The Gerrymander and 'One Man, One Vote'" 46 NYU Law. Rev. 779, (Nov. 1971)

by a substantial plurality. Under the political structuring principle applied by the Board, these large pluralities were considered wasted unless the excess could be distributed in other areas of the State where a party was not strong to assure victory of its candidates in these other areas.

The Board principle operated like referred pain. The ailment is in one part of the body and it hurts in the other.

In Connecticut, the major area of the Republican vote is in Fairfield County and there its candidates win by very large pluralities.[11] In other states, Democrats may win large pluralities in one or two of the major cities. By approving the Board's principle of political structuring, this Court would be establishing a national rule which allows the mutilation of legislative districts in one section of a state because a party obtained large pluralities from the natural concentration of the party's vote in another section of the state.

Gerrymandering is an evil which this Court has consistently warned against. It is an evil that is also universally condemned by the political scientists.[12]

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[11] Fairfield County comprises about 13 % of Connecticut land area (611 square miles out of 5009) and in 1970 it produced about 30% of the Republicans total statewide vote in the House district races. (Land area statistics derived from Connecticut *Register & Manual*, 1971 and election statistics derived from *Statement of Vote*, 1970, published by Secretary of State).

[12] See Edwards, supra at p. 892.

Baker, "Gerrymandering: Privileged Sanctuary or Next Judicial Target?" in Polsky, ed. *Reapportionments in the 1970's*, 121 (1971)

Hacker, *Congressional Districting* (1964)

McKay, "The Reapportionment Decisions, Retrospect & Prospect", 51 Am. Bar J. 128 (1965).

Even when, for a variety of reasons, this Court has refused to grant relief on claims of gerrymandering (*Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S.D.N.Y.), *aff'd per curiam*, 382 U.S. 4 (1965)), it has never condoned it.

Rather this Court has considered the factor of political party strength as irrelevant and improper in the application of the one man-one vote doctrine to the development of legislative districts.

In *Klahr* v. *Williams*, 313 F. Supp. 148 (D. Ariz. 1970), the Arizona State Legislature adopted a reapportionment plan by use of a computer programmed with, among other things, legislator incumbency and party strength in the districts. The District Court, declaring the plan unconstitutional, specifically stated (p. 152):

> "In addition we disapprove as inapposite the consideration of party strength as a factor in reapportionment or redistricting."

This court, in affirming the lower court's opinion in *Ely* v. *Klahr*, 403 U.S. 108 (1971), observed that the computer creating the districts had been programed to give priority to one party districts over districts drawn without regard to party strength and noted with approval the lower court had found "inapposite" the consideration of party strength.[13]

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[13] Appellant attempts to distinguish *Klahr* on the grounds that the plan was devised by a computer rather than by bi-partisan commission. This attempt is futile. Obviously the computer plan was designed by the bi-partisan cooperation of the legislature. Moreover, in the instant case, the Board tried to use a computer to achieve its objective of political structuring. (Pl. Ex. 27, Collins Dep. pp. 55, 56) However, the Board found it could structure the districts better by hand. (See also Special Master's Report.)

The Iowa Supreme Court has squarely held that a bipartisan plan specifically designed to provide safe districts for the members of both political parties was on that grounds alone unconstitutional. *In the Matter of Legislative Districting Noun* v. *Turner*, 193 N.W. 2d 784 (Iowa, 1972), the population deviation among the senatorial districts was 3.2% and among the house districts, 3.8%.[14] The court, however, noted that the plan was specifically designed to provide safe districts for the members of both political parties. The court stated:

> "In fairness we must observe the 'practical political advantage' referred to in creating districts to protect incumbents did not proceed solely to either political party, as there are instances of the creation of districts with predominantly Republican voter majorities as well as the creation of districts with predominantly Democratic voter majorities" (p. 789).

The court specifically held that a deliberate design to create politically safe districts was itself invidious and unconstitutional. It said:

> "However where, as here, a *conscious effort* is obviously present to devise and propose a plan which the legislature would accept because it would to *protect the individual legislators at the polls,* and districts lacking population equality or compactness are created for this political purpose, *invidiousness is established.* . . . We must conclude however that the impermissible consideration which impelled development of [the plan] so that it would be acceptable to the legislators merely because of *political preferment cannot pass constitutional muster*" (p. 790). (Emphasis added.)

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[14] It may be observed that these deviations, at least for the lower house, were less than the instant case.

However, in the words of the District Court, "we need not reach this question" of invalidating the Board Plan purely on the grounds of political gerrymandering. This Court has only to determine that political gerrymandering is not a legitimate state reason for population deviations among legislative districts.

On that point, this Court has already very clearly expressed itself in the *Kirkpatrick* case. In that case the appellants argued that population deviations must be considered in the context of "legislative interplay" (at p. 533). This argument is similar to the appellant's argument that legislative districting is a result of political party interplay. The appellants in the *Kirkpatrick* case also argued that the legislative leaders considered the redistricting plan a "reasonable legislative compromise" and they contended, much like the appellant does here, that "it must be recognized that practical political problems are inherent in the enactment of congressional reapportionment legislation" (at p. 533).

This Court had little difficulty with that argument. It rejected it out of hand, by stating "We agree with the District Court that 'the rule is one of *'practicality' rather than political practicality"* (at p. 533). This Court then went on to answer the question now before us by stating: "Problems created by *partisan politics cannot justify an apportionment* which does not otherwise pass constitutional muster" (at p. 533) (emphasis added).

Were this Court now to approve the political structuring utilized by the Board as a justifiable basis for population deviation in reapportionment cases, it would be a most startling reversal of policy. Not even the most ardent proponents of gerrymandering could expect such a bonanza.

C. Political structuring cannot be a rational state policy when it caused an increase in the number of town boundaries cut and thereby an unnecessary violation of the State Constitution.

The evidence is overwhelming that the political structuring principle applied by the creators of the plan caused the cutting of many Connecticut town lines.

Both Judge Saden and Mr. Collins testified that when there was a choice in the development of assembly districts between preserving town lines and achieving their notion of a political balance, they always chose the second objective.[15] In fact, Judge Saden specifically stated: ". . . It is far more important to have a fair plan than to preserve a town line . . ." (his Dep. p. 48) and "where there are other considerations of fairness . . . I did not insist town lines be maintained exact" (his Dep. p. 56). In both instances, Judge Saden clearly meant by fairness, not equality of the districts, but the achievement of his conception of the political balance.

Mr. Collins testified:

> "Q. But it's fair to say that in the development stage of the House towns were cut to achieve some sort of political result? A. Yes. I'd say there is only the one plan, that's right. The same is true in the Senate in the plans they were trying to achieve a Bbalance for towns skewed Democratic or skewed Republican" (Pl. Ex. 27 Collins Dep. p. 58).

As illustrative of the Board's practice of unnecessarily or excessively dividing towns solely for political reasons plaintiffs adduced evidence of specific example of cutting the towns of Killingly, Watertown, Montville, Hamden and North Haven.

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[15] See Collins Dep. pp. 30-31; Saden Dep. pp. 48, 56.

Plaintiffs' Exhibit 5 (in Saden Dep. Exhibit A), shows the town of Killingly was divided in the formation of assembly districts 50 and 51. Plaintiffs' Exhibit 5-A (Saden Dep. Ex. A-1) shows that a redesign of Assembly Districts 50, 51 and 52 could avoid dividing the town of Killingly. The geographic area encompassed by Assembly Districts 50, 5 1and 52 under the Board Plan is exactly the same as the geographic area encompassed by the Plaintiffs' alternative redesign of these same districts. The population deviation of each of these redesigned districts is within the deviational limits of the plan (Transc. p. 39). The reason for cutting Killingly under the plan was, as admitted by both Mr. Collins and Judge Saden, "too achieve a political balance" (Collins Dep. pp. 26, 27, 31, 32, 33; Saden Dep. pp. 40-45).

The same evidence proved the unnecessary division of the town of Watertown,[16] the unnecessary division of the town of Montville,[17] and the excessive segmenting of the towns of Hamden and North Haven [18] and all for the same reason of political balance.[19]

Since the Connecticut Constitution (Article III, Section 4) forbids the splitting of town lines in the formation of assembly districts and since the evidence established that the political structuring principle applied by the Board caused unnecessary town line cuts, the short, but complete, answer to the issue before us is that political structuring

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[16] See Pl. Ex. 6 and 6A; Transc. pp. 40-42; Collins Dep. pp. 26, 27, 33; Saden Dep. pp. 45-48.

[17] See Pl. Ex. 7 and 7A; Transc. pp. 42-43; Collins Dep. pp. 33, 34; Saden Dep. pp. 48, 51.

[18] See Pl. Ex. 8, 8A, 8B, 8C, 8D; Transc. pp. 43-49; Saden Dep. pp. 52-59 and particularly at p. 59.

[19] Further specific examples were not necessary when the authors of the Plan so readily conceded that political structuring justified the town cuts.

cannot be a rational Connecticut state policy when it caused a violation of the highest expression of Connecticut state policy, namely, its own State Constitution.

D. Partisan political structuring caused the bizarre and peculiar shapes of the districts.

When the excess plurality of a party in one area of the state becomes a justification for maneuvering to elect that party's candidates in another area of the state, inevitably the district lines must wiggle and ferret to probe out pockets of that party's strength. Judge Saden freely admitted this is precisely what happened in the development of the Board plan. He testified at the trial as follows:

> "Q. (By Judge Blumenfeld) In applying this corollary to the doctrine of fairness, is that what caused some of these districts to come out in what have been described as unusual shapes or shapes that deviate from normal? A. In some instances that may have occurred" (Transc. p. 134).

Even legislative districts which were compact, rational, and within town lines were required to be fragmented by the inexorable operation of the principle. Judge Saden himself conceded as much when he said each individual district could not be considered piecemeal no matter how fair it may be by itself but must be considered only in the context of how it fitted into the overall political balance principle.[20]

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[20] Judge Saden testified as follows:

> "Q. In deciding to add a portion of another town or a segment of another town did you in each case look to the election results for those continguous towns to determine which segment you were going to add? A. I gave consideration to that factor as a factor in testing the whole

Political structuring caused the weird, grotesque, almost Rorschach shapes of many of the districts as revealed in Plaintiffs' Exhibit 19. It accounted for the strained contiguity in the 9th Senatorial District of the Towns of Farmington and Newington which are connected by an empty swamp 1000 feet in length (see Plaintiffs' Exhibits 24A-E and 25A-E). The bizarre shapes of some of these districts, like those in the Town of West Hartford (Plaintiffs' Exhibit 9) and the Town of Manchester (Plaintiffs' Exhibit 10 and 10-A) were unnecessary and could have been avoided, as revealed by Plaintiffs' more rational redesign of those districts (Plaintiffs' Exhibits 9-A and 10-B) (See Transc. pp. 51-53, 54-48).[21]

When Judge Saden or Mr. Collins were asked to explain these shapes, they always fell back on the political factor.[22]

The District Court had persuasive evidence to find that the political structuring "method used resulted in creating some districts with highly irregular and bizarre outlines" (Mem. Dec. App. p. 7a).

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area and in trying to reach an overall fair plan. *I mean, you can't just take these things piecemeal* and say, 'Well, forget everything else and *just take this one little district here and is that a good fair district the way it is drawn?*' . . ." (Saden Dep. p. 82) (emphasis added).

[21] Other trial exhibits indicating the tortuous shapes of the Board's districts and a more rational and compact shape of those districts prepared by Plaintiffs without regard for political considerations are Exhibits 11 and 11A, 12 and 12A, 13 and 13A, 14 and 14A, 15 and 15A, 16 and 16A, 17 and 17A. ((See Transc. pp. 60-71)

[22] Mr. Collins testified:

"Q. Well, does not, however, Plaintiff's Exhibit E1 illustrate that census data alone was not the cause for all of the turns and twists that appear in he board plan? A. I never said that it was.

Q. It was the political consideration? A. Absolutely. Absolutely. I don't think anybody is denying this or should. (Collins Dep. p. 38)

Whether or not compactness is an aspect of "practical equality" (*Drum* v. *Seawell*, 260 F. Supp. 922 (N.D. N.C. 1966) and the lack of it is a "taint of arbitrariness" (*Paulson* v. *Meier*, 246 F. Supp. 36 (D. N.D. 1965) which on those grounds would invalidate the Plan, the District Court was clearly right in holding that political structuring which caused peculiarly shaped districts was not a rational state policy.

E. Political structuring deliberately created safe districts.

For the political structuring principle to work and in order to achieve proper relationship between the total party vote and assured election of the requisite number of the candidates of each party, the legislative districts must be made as safe as possible.

The evidence in this case establishes that this was precisely the objective of the Board. As an example, Mr. Collins testified with respect to the West Hartford Assembly Districts as follows:

> "Q. And was this plan developed in order to maximize his chances of reelection in West Hartford? A. I would say that we attempted to, I atempted to set up a plan along the lines I told you, one Republican, one Democratic, and one independent or one swing District in West Hartford" (Collins Dep. p. 39).

Likewise, Assembly District 48 in the Colchester-Montville area was made safe for the Democrats and Assembly District 37 was correspondingly made safe for the Republicans (Collins Dep. p. 34).

Swing senatorial districts were changed into safe districts. Mrs. Osborn testified at the trial that Senatorial District 18 prior to the plan had been a swing district which in the three elections of 1966, 1968, and 1970, the margin of

victory had been a few hundred votes out of a population of over 85,000. However, by the Plan deliberately removing the Democratic town of Griswold and adding a Republican portion of Norwich, the senatorial district became solidly Republican (Transc. pp. 122-125).

The creation of safe districts makes effective political action impossible for the Democratic voters in Republican safe districts and for the Republicans in Democratic safe districts. The District Court properly recognized this consequence when it stated:

> "It is arguably unfair to individual voters and potential candidates for political office to find themselves locked into districts deliberately structured to be 'safe districts' for a party they oppose."

The Court properly emphasized the sacrifice of individual voters to political party objectives. Requiring such a sacrifice of individual voters is invidious discrimination against them and a denial of their individual and personal right to an effective vote and to effective political action within their legislative district. As stated in *Reynolds* at page 561:

> "A predominant consideration in determining whether a state's legislative apportionment scheme constitutes an invidious discrimination . . . is that the rights allegedly impaired are *individual* and *personal* in nature" (emphasis added).

The creation of safe districts insulates the legislature against changes in political demands among its electorate. It means that unless there are landslide elections for one party or the other, the political composition of the legislature is more or less frozen. The legislature, as a consequence,

is unable to perform its basic task of translating public sentiment into public policy.[23]

Moreover, safe districts also insulate the individual legislators during a legislative session from the demands of their constituency because limited numbers of constituents cannot affect their reelection. The districts become the legislators' "fiefdoms" (*Ely* v. *Klahr, supra* at p. 118).

It is no answer, as appellant claims, that safe districts often result from residential patterns. Our point is that the political structuring which *deliberately* creates safe districts is not a rational state policy.

F. Political structuring results in a predetermination of the elections.

By far the most pernicious consequence of the operation of the political structuring principle is the deliberate designing of the legislative districts to predetermine the outcome of the elections throughout the whole State.

The culmination of the application of the principle was Mr. Collins' ability, with easy assurance, to assign each and every one of the 36 senatorial districts under the Plan to either one of the major parties. In identifying each of these senatorial districts as either a safe district for either party or a swing district for either party, he describes only two of the 36 districts as "swing either way" (Collins Dep. pp. 76-77).

Then in a truly remarkable performance, he similarly assigned to each party every single one of the 151 assembly

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[23] Appellant's counsel, when speaking as a political scientist, recognized this precise point. He said: "Ideally there should be a large number of swing districts in order that both parties be responsive to a broad spectrum of interests." (Dixon, "The Warren Court Crusade for the Holy Grail of 'One Man—One Vote'," *The Supreme Court Review*, U. Chic. L.R. (1969) at p. 251).

districts (Collins Dep. p. 78). It may be noted again that out of these 151 seats, only three were characterized as "swing either way". This is by far the most devasting evidence against the Plan.

It is critical to remember that this was not a prediction made by someone looking at the Plan from the outside. It is an analysis made by one of the chief architects of the Plan. It represents more than an informed guess, more than even a self-fulfilling prophecy. His testimony reveals the intent of the creators as to what the Plan was designed to achieve.

Obviously, there was some judgmental factor involved, but, as Collins himself admitted, he used the results of the three prior elections (Collins Dep. pp. 80, 81) and he tried to be as accurate as he could.

What is constitutionally significant is that an attempt was made to design the districts so as to program and control the outcome of the legislative elections for the entire State and for the next ten years.

This Court has interpreted the Equal Protection Clause to require that districts be as equal in population as practicable so that one man's vote has no more numerical weight than another's. That was an important advance.

But it is not enough that a vote be equal. It is more important that the vote matter.

To paraphrase the last lament of Faust: "What doest it profit a voter to gain the right to equality and lose the right of determination."

In Connecticut, as a result of political structuring, the voters gain neither and lose both.

Where voters are grouped and classified and made pawns in order to achieve a purpose unrelated to the essential requirements of the one man-one vote doctrine, then they have been invidiously discriminated against. They are thus denied their "individual and personal" right to an effective vote under the Equal Protection Clause (*Reynolds* at 562).

Such a policy cannot be rational justification for the deviations of the Board Plan.

G. Responding to appellant's benevolent gerrymandering argument.

The appellant argues that not only is political structuring of the districts justified as a matter of state policy, but it is beneficial.

The benevolence appellant ascribes to the Board doctrine is that it avoids, what he characterizes as, "minority government" which, he claims, results from a political party gaining a majority of the total vote of all the individual district elections and failing to elect a majority of the legislators.

Ther are so many practical, philosophical, and legal objections and errors to appellant's claim, that it is hard to express them all within the strictures of brevity required by a brief of this nature. Nevertheless, the appellant's claim is so insistent and apparently so central to his entire position, that we must respond.

At the outset, a distinction must be made between the following:

(a) On the one hand, the vote of the people; on the other, the party vote;

(b) On the one hand, election for a state-wide candidate, such as governor; and on the other, the election of legislators running in separate single member districts.

If, in a two-man race for state-wide office, a minority of the votes cast elected the winner, clearly we would have minority government. Likewise, if in a two-man race for assemblyman within each district, a minority of the votes cast in that district elected the winner, we would have minority government.

Moreover, if in all the legislative district races, a minority of the people in the state could elect a majority of the legislators, we would have minority government. This is the evil that the one man-one vote doctrine sought to remedy by requiring the equalization of the population in each district. As Chief Justice Warren said in *Reynolds* at p. 569, "It would seem reasonable that a majority of the people of the state could elect a majority of that state's legislators." [24]

The essential error of the appellant is in endeavoring to equate people vote with party vote. He urges that not only the majority of the people vote but also a majority of the party vote should, under the Equal Protections Clause, elect a majority of the legislators. However, the Equal Protections Clause is designed to protect people and not parties. The reach of the clause is even more specific. It is designed to protect individuals and not groups. As *Reynolds* says: ". . . each and every citizen has an inalienable right to full and effective participation in the political processes" (p. 565). The doctrine is one man-one vote and not one party-one guaranteed number of legislators.

Moreover, while the total vote for a state-wide candidate of one party, such as governor, obviously has meaning, the state-wide total of all the vote cast in the individual district races for all the district candidates of one party is of doubtful meaning. Whereas a state-wide candidate runs as a party candidate in all the districts, legislators run as

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[24]-Appellant's distortion of the meaning of the Chief Justice's statement at page 29 of his brief is simply incredible.

party candidates only in each individual district. The races in each of these individual districts are disparate. Although party affilation is of some significance, the district elections are more likely to be determined by different personalities, by the factor of incumbency and, at least up to this time in Connecticut where assembly districts have been coterminous with town boundaries, by local issues such as the prospect of low-income housing being brought into a town; the problem of sex education in the schools; a political scandal involving the mayor; and a completely local tax problem. Adding up the votes cast for each party's candidates in these different races which are decided on non-party issues is like adding up apples, rollerskates, and blue Buicks. It is doubtful whether that aggregate is a rational number upon which a rational state policy of reapportionment can be based.

Moreover, the concept urged by the appellant is without boundaries or standards. If a political party which acquires a majority of the aggregate vote of the district elections is entitled to a majority of its candidates being elected, then when the party acquires a specific percentage of this aggregate vote should it not get that percentage of its candidates elected?

What appellant's argument really comes down to is a plea for proportional representation. In fact, Judge Saden specifically admitted so.[25]

Viewed the other way, appellant's argument is an attack upon the single member system of representation. Such a system is premised upon legislators being elected from

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[25] Judge Saden testified:

"Q. (by Judge Blumenfeld) I don't want to over simplify this, but in effect what you were doing was establishing the principle of proportional representation on a statewide basis? A. Within very broad limitations." (Transc. p. 134)

specific districts in order to represent the local or regional interests of that district. This system of single member representation is subverted when a legislative districting plan is designed to elect legislators on the basis of a state-wide formula related to prior state-wide party vote.

The availability of proportional representation as an alternative electoral system does not excuse purposeful manipulation of the single member districts to achieve a balance of elected legislators between the political parties.[26]

In substantiation of his claim of the evils of "minority government," the appellant cites the 1970 Connecticut vote for the Senate (see Appellant's brief at pp. 28, 29). In that election, the Democratic candidates for the Senate in the aggregate received 518,726 votes and the Republican candidates received 536,555 votes; a plurality of 17,827 for the Republicans. The Democrats elected 19 senators and the Republicans 17. Thus appellant claims that there was an error of 1.6% of the vote by reason of the Democrats winning one more race than the Republicans.

On the basis of this example, appellant constructs his whole outcry of the dangers of "minority government." It is frightening to think that the appellant wants to engineer the apportionment of the Legislature to make the vote even more exact.

What the evidence really reveals is that the radical attempt to maneuver the legislative districts in order to achieve the proportional party representation of the kind the Board adopted, is simply not worth it. When the elusive benefit the appellant is claiming of precision between total party vote and legislators elected is weighed against the pernicious consequences of political structuring, it is clear that the balance falls strongly against political structuring.

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[26] See Edwards, "The Gerrymander and 'One man, One Vote'," 46 N.Y.U. Law Review, 897 (Nov. 1971).

These pernicious consequences, as the facts of the case reveal, are the following:

(a) Political structuring was a substantial cause of the population deviation.

(b) It caused the unnecessary cutting of town lines in violation of the State Constitution.

(c) It caused the bizarre shapes of the districts.

(d) It created the maximum number of safe districts.

(e) It predetermines elections for the next ten years.

(f) It foists upon the State a form of proportional representation in violation of the single member district system.

These consequences of the political structuring utilized by the Board warrant the Board Plan being invalidated on the grounds of insidious discrimination resulting from political gerrymandering. The Court below did not "reach this question" and we do not urge it on this motion to affirm (although we reserve it, if this motion is denied and jurisdiction is noted).

However, all that this Court need now determine is that the District Court below was entirely correct in concluding that political structuring is not a rational state policy which would justify the deviations of the Board Plan.

III.

The reapportionment Board in this case was dominated by partisan political considerations, was not a deliberative body, and is not entitled to a presumption of fairness.

The appellant argues that the Plan should be upheld because it is the product of a bi-partisan Board with a tie-breaker. His point is that such a Board institutionalizes fairness.

However, the evidence in this case reveals that partisan political consideration dominated the decision-making of the Reapportionment Board which created the Plan. Its primary concern was to achieve fairness between the political parties. The issue here, however, is not whether or not one political party gained an advantage over the other. The plaintiffs in this case are citizens and voters who assert their individual and personal rights under the Equal Protection Clause.

Whatever the composition of the reapportionment authority, when it failed to meet the required standard of equility among the legislative districts and failed to justify the deviations by a rational state policy, its handiwork violated the Fourteenth Amendment.

Moreover, the way the Board functioned in this case deprives it of any presumption of fairness. The Board was a one-man operation of Judge Saden, assisted by his counsel, Mr. Collins. It never met on the districting plan for the House. As a Board, it never met at all to take action on the entire Plan. The final Plan on the last day before the constitutional deadline was simply submitted to the "tie breaker", Justice Thim, for his signature and he had no choice but to sign it.

On July 1, 1971, pursuant to the Connecticut Constitution, Judge Leo Parskey of the Connecticut Superior Court was named to the Board by the Speaker of the House of Representatives, and Judge George Saden was nominated by the House Minority Leader. These two judges named Justice John R. Thim of the Connecticut Supreme Court, as the third member of the Board.

Judge Saden had served as counsel to the minority leadership in the Connecticut General Assembly from the date it convened on January 6, 1971. In this capacity he had toiled for some five months advising the minority members of the General Assembly and the eight-man Reapportionment Commission who attempted to meet the constitutional mandate of reapportionment. In June of 1971, Judge Saden was appointed to the Superior Court Bench by the Governor of Connecticut, which appointment was confirmed by the General Assembly on June 3, 1971.[27] He took office on or about June 15, 1971, and within two weeks he was named to the Reapportionment Board to begin work on deciding on a plan of apportionment on which he had been an actively partisan advocate for some five months.

The State Constitution required the Board to submit a reapportionment plan by September 30, 1971. The Board first met on August 24 or 25, 1971 (Saden Dep., p. 7; Collins Dep., p. 15). Judge Saden and Judge Parskey operated essentially independently of one another in the preparation of a plan and then tried to agree between themselves (Saden Dep., p. 8). Justice Thim was supposed to act as an arbitrator to resolve the difference when the two judges could not agree (Saden Dep., p. 8).

Judge Saden was substantially aided by Mr. James Collins, who was his chief assistant, mathematician and drafts-

[27] Journal of the Connecticut House of Representatives, 1971 Session, June 3, 1971.

man (Saden Dep., pp. 19, 21, 26; Collins Dep., p. 5). Mr. Collins, like Judge Saden, had served as special counsel to the Republican members of the eight-man Reapportionment Commission and from April 1, 1971, through July 1, 1971, had taken an active partisan role in the reapportionment process. Mr. Collins prepared the drafts of the plans which were submitted by Judge Saden (Saden Dep., p. 21).

Judges Saden and Parskey agreed as a matter of priority to deal first with the districting of the Senate. They spent the period from August 25 to September 24 primarily on this task (Saden Dep., pp. 8, 9, 12). A vote was taken on the Senate plan on September 24 in Justice Thim's office. After the vote, Judge Parskey left the meeting (Saden Dep., p. 13) and thereafter there was never another meeting of the Board as a board (Saden Dep., p. 14).

Although Judges Paskey and Saden may have discussed the districting plan for the House, the Board never met over it. After Judge Parsky left the meeting of September 24, Judge Saden testified, "we never got a chance to sit down and go over the House plan from that point on" (Saden Dep., p. 13; Saden Dep., pp. 10, 18).

The only plan of districting of the House that Justice Thim had presented to him was Judge Saden's, so he had no other choice but to accept that plan (Collins Dep., p. 47).[28]

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[28] Mr. Collins testified:

> "Well, the plan as submitted was accepted by Judge Thim, but if I remember correctly I think this was the only plan on the House that was submitted to Judge Thim. There was no other plan on the House submitted to him so the man in fact didn't have any choice, I suppose."

The Board never met to approve the final district lines for both the Senate and the House. The Plan was prepared in its final form, signed by Judge Saden, and then taken to Justice Thim for his signature on September 30 (Saden Dep., p. 13). Judge Parskey declined to approve the Plan but instead filed a dissenting report.

Thus, it is apparent that the document ultimately approved by the majority of the Board was the work of Judge Saden, assisted by Mr. Collins, who for the six months prior to the appointment of the Board had been actively engaged in the partisan efforts of the Connecticut General Assembly to negotiate a plan of reapportionment. They found themselves in the enviable position of advocating a point of view for six months and then getting to decide the issue the way they wanted it.

The foregoing indicates that one cannot simply look at the form of the Reapportionment Board and come to any conclusion that it is entitled to some special favoritism. In actual operation, it was neither deliberative nor nonpartisan. Therefore it is not entitled to any presumption of fairness. Its work product must be scrutinized as carefully as any other plan of apportionment to come before this Court and the criteria for determining its constitutionality must be the same.

IV.

If this Court allows deviations higher than the lowest practicable to achieve, then the proper interpretation of the supremacy clause would permit a state constitutional policy of preserving town lines to justify a higher deviation among the house districts than provided in the Board plan.

If this Court construes the Fourteenth Amendment to permit deviations from equality higher than those permitted by the District Court and higher than the lowest that is

practicable to achieve, then the state plan is still unconstitutional because, contrary to the Supremacy Clause, it applies an unnecessarily restrictive Fourteenth Amendment standard at the expense of a valid state policy of preserving town lines.

The District Court properly read the leading decisions of this Court (*Reynolds, Swann, and Kirkpatrick*), to mean what they appear to say: namely, that the Equal Protections Clause requires that population of legislative districts must be "as nearly equal as is practicable". The Court found that the requisite standard of "as equal as practicable" had not been met and the availability of a plan with a lower deviation irrefutably supports this finding. It further found that the political structuring principle was a substantial cause of the deviation and that this principle was not a proper state policy to justify the deviation.

Appellant claims that the District Court decision is unnecessarily restrictive and that deviations higher than those mathematically necessary should be allowed.[29]

If this Court is going to reinterpret its prior decisions to permit deviations which are higher than can be practicably achieved, then the plaintiffs contend the Board plan is still unconstitutional because it violates the Supremacy Clause. In essence, we contend that if the Fourteenth Amendment does not require as small a deviation as is practicable, then a plan prepared under whatever greater latitude this Court might now be prepared to permit, must, within reasonable limits, accommodate state interests such as the integrity of town lines. For example, if this Court is now to permit deviations up to 15%, the Court would be interpreting the Fourteenth Amendment not to require any

[29] The Appellant also claims that the political structuring principle was a permissable state policy but we have dealt with the lack of merit in this claim above.

smaller deviation. Under the Supremacy Clause, state interests—certainly those set forth in a state's constitution—must not be impaired to any extent greater than required by federal law. Thus, if this Court is now to accord states more latitude, then it must also accord an opportunity for the development of a plan that preserves valid state interests (here, town lines) to as great an extent as federal requirements permit. It would be a coincidence defying belief if the deviation of the Board's Plan was precisely the limit this Court is now prepared to say the Fourteenth Amendment permits. But even if this were so, the evidence shows the Board Plan cuts more towns than need to be cut even at the same deviation. (See Plaintiffs' Ex. 20). If any larger deviation is permitted as a matter of federal constitutional law, then any state plan that cuts town lines more than is necessarily required by the federal standard violates the Supremacy Clause.

Plaintiffs' position is not inconsistent, as the appellant's brief alleges. Plaintiffs are not saying that the deviations, as mathematical expressions, are simultaneously both too high and too low under the existing standard. Plaintiffs are saying that if the deviations must be as small as practicable, in the absence of a valid state policy justifying same (and political structuring is not a valid state policy), the deviations in the Board Plan are too high. But under any new and less exacting standard of deviation enunciated in this case by this Court and in the presence of a valid state policy (such as the preservation of town lines), the deviations in the Board Plan are too low.

If the *Kirkpatrick* case creates a stricter requirement of equality only for Congressional districts than *Reynolds* does for state legislative districts, then giving greater weight to a state policy of preserving town lines as a justification for deviations is a logical way to reconcile and rationalize these cases. In congressional districts (*Kirkpatrick*) towns are not nearly as important as governmental entities as they

are in state legislative districts (*Reynolds*), and, because of the much larger size of congressional districts, (*Kirkpatrick*), it is easier to achieve equality while respecting town lines than it is in the much smaller sized state legislative districts (*Reynolds*).

As indicated above, the Board applied the political structuring principle so as to increase the number of town lines cut (*infra*).

If this Court recognizes respect for town lines as a legitimate reason for higher than mathematically necessary deviations, then the effectuation of this state policy justifies deviations higher than the Board Plan.

Plaintiffs submitted to the Court a plan for the House was a deviation from the ideal ranging from a high of plus 5.58% and a low of minus 5.97%, which resulted in the division of 31 towns as compared to the Plan's 47 towns and creating 39 segments as compared to the Plan's 78 segments (Plaintiffs' Exhibit 21). Plaintiffs also submitted to the Court a plan for the apportionment of the House with a population deviation from the ideal of plus or minus 7.5% which resulted in the division of 27 towns as compared to the Plan's 47 towns and created 34 segments as compared to the Plan's 78 segments (Plaintiffs' Exhibit 22). The later plan represents almost a 50% reduction in the fragmenting of towns at a relatively slight increase in percentage deviation.

This Court has recognized that variations in permissible deviations in order to effectuate particular state policy may depend "on the particular circumstances of the case" (*Reynolds* at p. 578; *Swann* at p. 445). Apart from the generalized argument that the preservation of town lines deters gerrymandering, the facts of this case justify a deviation higher than plus or minus 3.9% in order to preserve town lines.

A. Towns perform state functions.

This Court noted in *Reynolds* (pp. 585-591) that local governmental entities are "frequently charged with various responsibilities incident to the operation of said government. In states much of the legislature's activity involves the enactment of so-called local legislation directed only to the concerns of particular political subdivisions." See also *Jackman* v. *Bodine*, 55 N.J. 371, 262 A. 2d 389 (1970).

In Connecticut the towns perform many important functions of state government. Some they perform as actual agents of the State such as public school education, welfare, and highway maintenance (Transc. pp. 20-22). The State makes a number of block grants and a number of specific purpose grants to the towns for community development, clinics for mentally retarded, urban renewal, clean water, and many other purposes (Transc. pp. 22-25; Pl. Ex. 2).

B. Towns as political organizations of citizens.

Originally all Connecticut towns had a town meeting form of government. Surprisingly, even to this day, 101 of the 169 towns and cities in the State of Connecticut still have open town meetings (Transc. p. 27). In addition there are 28 towns which have a limited town meeting form of government and 7 towns which have a representative town meeting form of government (Transc. p. 27).

The open town meeting functions as the legislative body of the town. All voters and all residents of the towns who own at least $1,000 worth of property on the grand list can attend the meetings, adopt the town budget, and consider and take action on any othe ritems that properly come before the town meeting (Transc. p. 28).

In the limited town meeting form of government, the power and the authority of the citizens in a town meeting are limited to certain specific responsibilities such as the adoption of the annual budget, purchase and sale of real estate, and the approval of bond issues (Transc. p. 28).

In the representative town meeting form of government, the citizens elect representatives to act for them in their town meetings but citizens can come to the meetings and voice their opinions (Transc. pp. 28-29).

Of the total of 47 towns cut by the Board Plan, 16 had some form of town meeting form of government (Transc. pp. 29, 84).

Even in the towns which do not have a town meeting form of government, Connecticut citizens operate directly in the political affairs of the town. Many of these towns have initiative and overrule built into their city and town charters which gives the citizens an opportunity to petition for the adoption of a new ordinance or overrule the actions of the town manager or town council. Likewise, many town charters require that bond issues in excess of a given amount must automatically go to a town-wide referendum. Then, of course, citizens vote in towns for local town councils, mayors, and boards of education (Transc. pp. 30-31).

The residents of a town thus have a political relationship among themselves. They have learned to act together. Their coherence as fellow townsmen gives them political strength. They are capable of holding their elected officials accountable to them.

Elected officials of a single town are visible and identifiable to the residents of that town. These officials know that their constituency is organized into an active and functioning political unit. As a consequence, the elected officials themselves are required to be more responsible and more responsive to the residents of their towns.

This applies not only to local officials but to the representatives to the State Legislature from the Connecticut towns.[30] They are expected to represent the town in the Legislature as well as the broader State interests. The townspeople hold them accountable and they feel a sense of responsibility to the town.

On the other hand, the residents of a legislative district composed of portions of two or more towns have no collective identity, no organization among themselves, little ability as constituents to act in concert to hold their representatives accountable and responsible to them.

There may be some states in the country where the foregoing argument is not applicable because there is not a comparable tradition and practice of town resident participation in the town government and an access to and identification with the representatives from their towns in the state legislature. But in Connecticut, this tradition and practice is important. Thus the preservation of town integrity makes justifiable a greater constitutionally permissible deviation in the size of legislative districts in order to allow free play of the aforesaid tradition and the current practice of local constituency.

Allowing more flexibility in the interpretation of the Fourteenth Amendment in order to give greater weight to the State Constitutional prohibition against dividing town lines is the proper way to apply the Supremacy Clause of the United States Constitution. Whenever possible, accommodation should be achieved and conflict minimized in the interpretation of the provisions of both the federal and a state constitution. (*Reynolds* at p. 584; see also *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926); *Joseph E. Seagram*

[30] Under the Conn. Gen. Statutes (§ 9-372) a "municipal office" includes state representatives or state senators from districts within a single town.

& Sons, Inc. v. *Hosteter,* 384 U.S. 35 (1966); *Potlatch Forests, Inc.* v. *Hays,* 318 F. Supp. 1368 at 1371 (E.D. Ark. 1970).

If this Court enunciates a new interpretation of the requirement of practicable equality under the one man-one vote doctrine, this case should be remanded with direction to the District Court to apply the new rules to the facts of this case or to give the State an opportunity to do so.

CONCLUSION

For the reasons stated herein this Court should affirm the judgment of the District Court for the District of Connecticut here appealed from.

If this Court reinterprets its prior decisions to permit deviations which are higher than strict mathematical equality, then this case should be remanded to the District Court with direction to apply the new rules to the facts of this case or to give the State an opportunity to do so.

Appellant, in his jurisdictional statement, requested the Court to order the interim use of the Board's Plan in the 1972 election. After filing its jurisdictional statement, it filed a separate motion for stay in this case. If that motion has not been acted on prior to the submission of this brief, then for the reasons stated in Plaintiffs' Memorandum in Opposition to Appellant's Motion for a Stay, and on the basis of this brief, the stay should be denied.

Respectfully submitted,

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Dated: June 9, 1972

APPENDIX

APPENDIX A

Memorandum of Decision of Mr. Justice Smith

United States District Court

DISTRICT OF CONNECTICUT

Civil Action No. 14,736

THEODORE R. CUMMINGS, CURT F. BECK, OWEN L. CLARK, GERALD F. HEFFERNAN, JOHN P. DUFFEY, HAROLD C. NUCCIO, RUSSELL E. VINING, ANNE DILLON DALTON and OMAR ALLVORD on behalf of themselves and all others similarly situated,

Plaintiffs,

—and—

NANCY ARONIE, ROBERT D. ALEXANDER, LINDA B. BEIZER, SANTE ESPOSITO, JR., and CHARLOTTE KITOWSKI on behalf of themselves and all others similarly situated,

Intervenors,

—v—

THOMAS H. MESKILL, Governor of the State of Connecticut; GLORIA SCHAFFER, Secretary of the State of Connecticut; ROBERT I. BERDON, Treasurer of the State of Connecticut; and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Defendants,

—and—

J. BRIAN GAFFNEY,

Intervenor.

Before: SMITH, *Circuit Judge,* and BLUMENFELD and ZAMPANO, *District Judges.*

Memorandum of Decision

SMITH, *Circuit Judge:*

This action challenges the Reapportionment Plan for the Connecticut General Assembly devised by a Board of three members, the last available link in a chain of methods mandated by the Connecticut Constitution for the production of a plan of reapportionment for the 1972 elections. The plaintiffs are U.S. citizens, residents of towns in Connecticut, taxpayers, and registered voters. They claim that the Plan violates the Fourteenth Amendment because the deviations from mathematical equality among the districts are impermissibly large, particularly since they have not been justified on the basis of the pursuit of legitimate state policies. They also claim that residents of certain tracts have been entirely omitted from the Plan and that one assembly district is not contiguous. Intervenors Aronie et al. claim that the methods for appointment of personnel for drawing the Plan as well as the Plan ultimately produced deny unaffiliated voters a voice and are therefore unconstitutional. The defendants are officials of the State of Connecticut responsible for enforcing its laws, particularly the Secretary of the State, who is responsible for the conduct of elections. J. Brian Gaffney, intervening as an individual elector of New Britain, argues that the Plan is constitutional, that in any case this court should abstain pending state court action, and that inadvertent errors of omission and lack of contiguity may be corrected, preferably in a state court action now pending.

The action arises under the Fourteenth Amendment to the Constitution of the United States, the Supremacy Clause, Article VI, Clause 2 of the Constitution, and 42 U.S.C. §§ 1983 and 1988. Jurisdiction is conferred by 28 U.S.C. §§ 1343(3) and 1343(4). Plaintiffs seek a temporary and permanent injunction restraining the officers of the state from holding elections in accordance with the present Plan and for further delineation of the rights of the parties.

Memorandum of Decision

A three-judge district court was convened to hear and determine the case pursuant to 28 U.S.C. §§ 2281, 2284.

The Connecticut Constitution, adopted following the successful attack on the former system of apportionment in *Butterworth* v. *Dempsey*, 229 F. Supp. 754 (D. Conn.), *aff'd* 378 U.S. 564 (1964), and 237 F. Supp. 302 (D. Conn. 1965), requries that the Senate consist of 30 to 50 members and that each senatorial district be contiguous as to territory. The House must consist of from 125 to 225 members; each district is to be contiguous as to territory and no town can be divided except for the purpose of forming assembly districts wholly within the town. Article Third, §§ 3, 4. The Constitution also requires that the establishment by the General Assembly by two-thirds vote of each house at the first regular session next after the completion of the United States census provided that if the Assembly fails to act by the first of April, a Commission of eight members designated as provided in the Constitution should submit a plan to the Secretary of the State by the first of July and failing timely action by the Commission, a Board of three persons consisting of two Superior Court judges chosen respectively by the Speaker of the House and the Minority Leader of the House and a third member, an elector, selected by the two members so designated is required to submit a plan of districting to the Secretary of the State by October first. When the Assembly and the Commission failed timely to submit a plan, pursuant to this provision Superior Court Judges George A. Saden and Leo Parskey were chosen and in turn selected Justice John R. Thim as the third member of the Board. A plan was approved and adopted by two members of the Board, Judge Saden and Justice Thim, and submitted on September 30, 1971 to the Secretary of the State. The third member of the Board, Judge Parskey, did not approve of the Plan and submitted a minority report. The Plan reapportions the General Assembly of the State of Connecticut.

Memorandum of Decision

The population of the State of Connecticut, according to the 1970 census, is 3,032,217.

The Plan provides for a House of Representatives consisting of 151 members, each elected from a single assembly district. With a population of 3,032,217 and 151 assembly districts, the perfect number of people in each assembly district should be 20,081.

The Plan provides for a Senate consisting of 36 senators, each elected from a single senatorial district. With a population of 3,032,217 and 36 senatorial districts, the perfect number of people in each senatorial district should be 84,228.

The population of assembly districts created by the Plan deviates from the perfect average of 20,081 by a maximum of plus 3.93% or 789 people, and by a minimum of 3.90% or 784 people for a total deviation of 7.83%.

In 39 assembly districts under the Plan or 25.83% of the 151 assembly districts, the population deviates from the perfect average of 20,081 by plus or minus 3.0% to 3.93%. The population of 34 assembly districts, 22.52% of the total, deviates by plus or minus 2.0% to 2.99%; the population of 47 assembly districts, 31.12% of the total, deviates from 1.0% to 1.99%; and the population of the remaining 31 assembly districts of the total of 151 assembly districts, 20.53% of the total, deviates from 0.0% to 0.99%.

The average deviation from perfect equality for all the assembly districts under the Plan is 399 people or 1.9% and a mean deviation from perfect equality for all the assembly districts is 373 people or 1.8%.

The ratio of the largest assembly district to the smallest assembly district under the Plan is 1.082 to 1.

The population of senatorial districts created by the Plan deviates from the perfect average of 84,228 by a maximum of plus 0.88% or 745 people and by a minimum of

minus 0.93% or 787 people for a total deviation of 1.81%. The average deviation from perfect equality for all the senatorial districts is 379 people or .45% and a mean deviation from perfect equality for all the senatorial districts is 392 people or .47%.

The ratio of the largest senatorial district to the smallest senatorial district under the Plan is 1.018 to 1.

The smallest number of people needed to elect a majority in the House of Representatives (sometimes known as the electoral percentage) is 49.33%.

The smallest number of people needed to elect a majority in the Senate (the electoral percentage) is 52.54%.

The boundary lines of 47 towns are cut under the Plan so that one or more portions of each of these 47 towns are added to another town or a portion of another town to form an assembly district.

Twenty-nine of the aforesaid 47 towns have their boundary lines cut more than once resulting in more than one portion of the town being added to another town or a portion of another town to form an assembly district. If a segment of a town is defined as a portion of a town being used to form an assembly district not wholly within that town, the Plan creates 78 segments of towns in the formation of 151 assembly districts.

The formation of 55 of the 151 assembly districts involved the segmenting of towns and 96 assembly districts are wholly within town boundaries or are formed by the combination of entire towns.

Twenty-three towns are segmented to create senatorial districts under the Plan.

The boundary lines of assembly districts do not mesh with the boundary lines of senatorial districts. Eighty-one assembly districts under the Plan are not located entirely within a senatorial district and in 48 of these 81 assembly districts, a division between two senatorial districts occurs within a town.

Memorandum of Decision

The smallest units of census data available to the Reapportionment Board were block groups within census tracts and enumeration districts. The average population of block groups is between 1200 and 1250 people. The average population of enumeration districts is between 750 and 800 people. There is a total of approximately 2750 block groups and enumeration districts; of these about 80% are block groups and about 20% are enumeration districts. Of these approximately 2750 census areas the Board had to work with, the average area contained approximately 1100 people, and the mean area contained approximately 1000 people; 88% of this total of 2750 areas exceeded 400 people in size.

Annexed hereto is a breakdown of the population of senatorial and assembly districts prepared by the United States Department of Commerce, Bureau of the Census, from the results of the census as of April 1, 1970.

In developing the Plan, Mr. Collins, acting for the Board under the direction of Judge Saden, gave principal weight to two considerations in Senate and House districting, numerical equality and a partisan balancing of strength in each house, and in the House districting also the undesirability of splitting towns.

The partisan balancing of strength in each house, termed by intervening defendant a "fair political balance" and by plaintiffs "political gerrymandering" was obtained by so adjusting the census areas utilized as building blocks into the structuring of Senate and House districts that, on the basis of the party vote for all the Senate candidates of each party in the elections of 1966, 1968 and 1970, whichever party carried the state should carry a majority of Senate seats proportional to the statewide party majority, and likewise in the House, based on the party vote for all the House candidates of each party in the same three elections.

In one or more House and one or more Senate districts some accommodation was also made in the interest of retaining in office a particular incumbent.

The result apparently obtained by Mr. Collins made up a House of approximately 70 safe Democratic seats, 55 to 60 safe Republican seats, with the balance designed as probable Democratic, swing Democratic, probable Republican, swing Republican, or just plain swing.

The Senate result was characterized as 16 solid Democratics, 2 probable Democratic, 12 solid Republican, 4 probable Republican and 2 swing.

The method used resulted in creating some districts with highly irregular and bizarre outlines. While there is no provision in the Federal or Connecticut Constitutions requiring that legislative districts be compact, the courts have looked to a lack of compactness, see *Paulson* v. *Meier,* 246 F. Supp. 36, 43 (D.N.D. 1965) or have required absence of arbitrariness, *Roman* v. *Sincock,* 377 U.S. 695 (1964) in determining whether impermissible purposes rather than compelling state interests have caused deviations from equality; and see *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960) ("uncouth twenty-eight-sided figure" in racial gerrymander.) Here the peculiar shapes are additional support for the admitted part of the political balance theory played in the structuring of the districts. See also, *Drum* v. *Seawell,* 250 F. Supp. 922 (M.D.N.C. 1966) "compactness and contiguity are aspects of practicable equality." If partisan political balancing were eliminated as a factor, a closer approach to perfect equality could be achieved with the materials at hand (see Plaintiff's Exhibit 23, attached as Appendix A), or in the alternative fewer town lines could be cut. (See Plaintiffs' Exhibits 20, 21 and 22, Appendices B, C, and D).

We find that the court has jurisdiction over the parties and subject matter of the action.

We conclude that the deviations from equality of populations of the Senate and House districts are not justified by any sufficient state interest and that the Plan denies equal protection of the law to voters in the districts of greater population in violation of the Fourteenth Amendment to the Constitution of the United States. The Plan is therefore invalid and its employment in elections to the Connecticut General Assembly must be enjoined.

Intervening defendant urges that we abstain from action in this case pending resolution of an action in the state courts. We note in this connection that the Attorney General of Connecticut has questioned the jurisdiction of the state courts over the action of the Board as a constitutional body. We do not share his concern over the power of the state courts to act, but find the abstention doctrine inapplicable to this case.

The abstention doctrine of *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U.S. 101 (1944) and its progeny would encourage abstention by the federal courts pending resolution by the state courts of ambiguities in state legislation whose resolution might eliminate the federal constitutional question entirely. Here, however, the interpretation of the state constitutional provisions by the state court will not eliminate the question of whether the Board's Plan either as written or as modified in the respects sought in the state court action complies with the so-called "one-man-one-vote" requirement of *Baker* v. *Carr,* 369 U.S. 186 (1962); *Reynolds* v. *Sims,* 377 U.S. 533 (1964) and the cases which have followed, see *Roman* v. *Sincock,* 377 U.S. 695 (1964); *Lucas* v. *Colorado General Assembly,* 377 U.S. 713 (1964); *Swann* v. *Adams,* 385 U.S. 440 (1967); and especially the more recent cases of *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969) and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969). *Davis* v. *Mann,* 377 U.S 678 (1964), an apportionment case, holds that "where the federal court's juris-

diction is properly invoked and the relevant state constitutional and statutory provisions are plain and unambiguous there is no necessity for the federal court to abstain pending determination of the state law questions in a state court," citing *McNeese* v. *Board of Education,* 373 U.S. 668 (1963). See also, *Damico* v. *California,* 389 U.S. 416 (1967); *Sostre* v. *McGinnis,* 442 F.2d 178 (2d Cir. 1971) (*en banc*), *cert. denied,* ..... U.S. ..... (March 6, 1972); *Rodriguez and companion cases* v. *McGinnis,* .... F.2d ..... (2d Cir. Jan. 25, 1972) (*en banc*); *Wilwording* v. *Swenson,* ..... U.S. ..... (Dec. 14, 1971). So we reach the merits.

The constitutional principle of the vote cases appears to be that deviations from absolute numerical equality which are more than minimal may not be allowed unless they are either the unavoidable results of attempts to obtain precise equality or are justified by some legitimate state interest. While the early cases seem to indicate that political subdivision boundaries and geographical and historical factors could justify some deviations from equality, dilution would not be allowed "in any substantial way." See *Reynolds* v. *Sims, supra.* Applying this standard there have been very few bases for deviation approved. As Justice Fortas remarked, concurring in *Kirkpatrick,* "the Court rejects almost every justification that would support any variation." *Abate* v. *Mundt,* 403 U.S. 182 (1971) did permit deviation for a legitimate state interest based on the unusual historical interrelationship of local and county governmental bodies in New York carrying out dual functions with dual personnel. We have no such situation here. The defendants seek to justify the deviations here as the products of a good faith effort to reach equality while honoring the state constitutional requirement of keeping to town boundaries and at the same time balancing the results for partisan political fairness, that is, to achieve

an apparent balance of partisan political strength in the Assembly coinciding with the total statewide partisan political balance measured by the results in the last three Assembly elections. Plaintiffs attack this as political gerrymandering and base their case primarily on the claim that this is in itself constitutionally prohibited. Defendants contend that it is not only prohibited but not justiciable as a political question. It is quite possible that if the sole question were political gerrymandering it would be non-justiciable. See *Sincock* v. *Gately*, 262 F. Supp. 739 (D. Del. 1967); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *WMCA Inc.* v. *Lomenzo*, 238 F. Supp. 916 (S.D.N.Y. *aff'd per curiam*, 382 US. 4 (1965), with a concurring opinion in which Mr Justice Harlan interpreted the decision to mean that the Supreme Court must be held to have found partisan gerrymandering immune to constitutional attack, and the *per curiam* opinion of the Supreme Court, 385 U.S. 114 (1966) on appeal from the Supreme Court of Michigan, 377 Mich. 396, 140 N.W. 2d 436, *In the Matter of the Apportoinment of the Michgian Legislature, Badgley, et al., Appellants*, dismissing the appeal, stating "the motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question." See also, *Cousins* v. *City Council of Chicago*, 322 F. Supp. 428 (N.D. Ill. 1971) and *Skolnick* v. *Mayor & City Council of Chicago*, 319 F. Supp. 1219 at 1229 (N.D. Ill. 1970). *Ely* v. *Klahr*, 403 U.S. 108 (1971) and *Whitcomb* v *Chavis*, 403 U.S. 124 (1971) also seem to indicate that claims based purely on political gerrymandering would be extremely difficult to sustain if justiciable at all. But we need not reach this question. From the other side there is no doubt that political gerrymandering cannot be approved as a legitimate reason for violating the requirement of numercial equality of population in districting. While it may be fair in one sense in obtaining an overall political balance, it is arguably unfair to individual voters and potential candidates for

political office who find themselves locked into districts deliberately structured to be "safe" districts for a party they oppose. No legislative or constitutional enactment provides any basis for it or authorizes it. No compelling state necessity for it is demonstrated. The Supreme Court plainly would not approve the partisan political structuring which was a substantial cause of the numerical deviations of the Board Plan here. In *Ely* v. *Klahr, supra,* the Court approved of the invalidation of a legislative plan by the lower court, which had found "inapposite" "the consideration of party strength as a factor in reapportionment or redistricting" as well as a purpose to minimize contests between incumbents. We must therefore invalidate the Plan before us and require closer adherence to the constitutional guidelines.

The effort by the intervening defendants to create a new constitutional requirement of inclusion of a class of registered voters unaffiliated with any party in setting up districting boards or commissions need not give us pause. There is no precedential basis for the claim. What little precedent we have found looks the other way. See *Socialist Workers Party* v. *Rockefeller,* 314 F. Supp. 984, 997 (S.D.N.Y., *aff'd* 400 U.S. 806 (1970) (Major party chairmen permitted to take part in selecting members of Board of Elections). The area is sufficiently confused as it is without attempting further to shackle constitutionally the legislative bodies seeking to act in the field. The unaffiliated voter takes part on an equal basis in the election of the Assembly, from whose members participants in the appointment of the Commission and Board are chosen.

We do not reach the pendent claim of non-compliance with the state constitution or the matter of correcting the inadvertent errors in view of the fact that we are adopting another apportionment in any case.

It would be preferable to a court-imposed plan, of course, if a valid plan were adopted by the legislature in place of

the Plan of the Board here invalidated. We would welcome such action. However, the time is short and delay in the hope of such legislative action is not justified.

We hold that the state constitutional scheme for decennial redistricting of the Connecticut General Assembly is not itself invalid as in violation of the Fourteenth Amendment of the Constitution of the United States. We hold, however, that the Plan adopted by the Board under the constitutional scheme denies the equal protection of the law to plaintiffs whose voting power is diluted by the deviation from numerical equality of the Senate and Assembly districts set up by the Plan. Defendants are enjoined from any action to implement the Plan or to hold elections thereunder. The court will appoint a master with instructions to devise a plan conforming to federal and state constitutional requirements, to be submitted to the court and placed in effect.

The foregoing shall be considered the findings of fact and conclusions of law of the court under Federal Rule of Civil Procedure 52a.

If a constitutional plan is enacted into law prior to a court order placing a court plan in effect application may be made to modify the court's judgment. The court will retain jurisdiction for all purposes.

Dated at Hartford, Connecticut, this 30th day of March, 1972.

/s/ J. JOSEPH SMITH
J. JOSEPH SMITH,
U.S. Circuit Judge

/s/ M. JOSEPH BLUMENFELD
M. JOSEPH BLUMENFELD,
U.S. District Judge

/s/ ROBERT C. ZAMPANO
ROBERT C. ZAMPANO,
U.S. District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1476

J. BRIAN GAFFNEY, *Appellant*

v.

THEODORE R. CUMMINGS, ET AL.,
NANCY ARONIE, ET AL., AND
THOMAS J. MESKILL, Governor of the State of
Connecticut, ET AL., *Appellees*

BRIEF FOR APPELLANT

Appeal From the United States District Court for the District of Connecticut

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OPINION BELOW

The opinion delivered in the District Court by Memorandum of Decision dated and filed March 30, 1972 is reported at 341 F.Supp. 139, and appears in the Jurisdictional Statement at pages 1a-14a.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review this case by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Notice of this appeal was filed with the Clerk, United States District Court, District of Connecticut, on April 13, 1972.

Probable jurisdiction of the appeal was noted on October 10, 1972.

STATE LAW INVOLVED

This appeal involves the validity of a plan of reapportionment for the Connecticut General Assembly, prepared and promulgated under the state constitution by a bipartisan board, submitted to the Secretary of the State, and published by the Secretary so as to have the full force of law. Conn. Const. Art. III, § 6(e), text set forth in Jurisdictional Statement, Appendix D, p. 16a. The plan and its contained maps appear of record as Plaintiffs' Exhibit 1, Trial Transcript, p. 6, on file in this Court. They are not readily susceptible of reprinting and the text is not materially pertinent to the salient issues on this appeal.

QUESTIONS PRESENTED*

1. Whether the substantial equality principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), is satisfied by a state legislative apportionment, based on available census units

* The abstention issue, reserved as an issue in the listing of questions presented in the Jurisdictional Statement, p. 7, is deemed to have been so overridden by subsequent events that it is not now being pressed. The arguments thereto are presented in the Jurisdictional Statement, pp. 55 to 57. As noted in the section, *infra*, this Brief on "Events Since District Court Judgment", a lower state court and the state supreme court have validated the State Plan for use in the 1972 election, and the reserved jurisdiction of the state supreme court now that that court has acted on the plan is so dependent on resolution of federal issues here that invocation of abstention now would perpetuate uncertainty and confusion and lead to further litigation and appeals.

averaging 1,100 people each, in which the maximum population deviation from ideal is 787 persons (0.93 percent) for the 36 senate districts and 789 persons (3.93 percent) for the 151 assembly districts, and in which the average population deviations for the senate and assembly districts respectively are 379 persons (0.45 percent) and 399 persons (1.9 percent).

2. Whether a substantial federal issue is raised by the number of town line cuts reflected in the Apportionment Board's plan, in view of the conceded necessity to cut town lines in order to comply with the equal population principle of the Fourteenth Amendment.

3. Whether the bipartisan Board's further policy of seeking political fairness and avoiding districts which could again produce a minority legislature, a policy which entailed consultation of past election data and insignificantly increased the number of town cuts, violates the Equal Protection Clause of the Fourteenth Amendment absent proof either that such a policy increased population deviations or that such policy caused invidious discrimination by minimizing or cancelling out the voting strength of racial or political elements of the voting population.

STATEMENT

This appeal concerns the constitutionality of a plan of apportionment for the Connecticut General Assembly, filed with the Secretary of the State on September 30, 1971, and thereafter published with the force of law by the Secretary in December of 1971. The plan was devised by a bipartisan, three-man Apportionment Board. The Board is the back-up mechanism under the Connecticut Constitution for antecedent reapportioning stages. The constitution, as applied to the actual process in Connecticut in 1971, provided an initial opportunity for the legislature to reapportion itself by April 1, 1971. When the legislators failed to agree on a plan, a bipartisan, eight-man commission was appointed (the party leaders in the legislature each appointing one-half) to devise a reapportionment plan by July 1, 1971.

The commission deadlocked and thereupon a three-man bipartisan board was constituted under the state constitution. The Democratic speaker and the Republican Minority leader in the lower house each designated a judge of the superior court as a member of the Board, the speaker designating Judge Leo Parskey and the minority leader designating Judge George A. Saden. The two persons so selected were empowered under the constitution to select an elector of the state as a third member; in this instance a justice of the state supreme court was selected. Conn. Const. Art. III, §§ 1, 3-6. The method of selection agreed on was for Judge Parskey to prepare a list of names acceptable to him, and for Judge Saden to select from that list; on this basis Justice John R. Thim was selected. Saden Dep., Single App. pp. 21-22.

This Board of three judges discharged its function and filed its plan on September 30, 1971. One member of the Board filed a short dissenting statement. The plan describes legislative districts in terms of 1970 census maps and figures. Final House and Survey Maps found at Trial Trans., Single App., pp. 138-39.

As noted in the District Court opinion below, the smallest units of census data available to the Apportionment Board were block groups and enumeration districts. The average population of the former was between 1,200 and 1,250 people; of the latter, between 750 and 800 people. Of the total number of these 2,746 census units of Connecticut, 80% were block groups, and the average population of the 2,746 census units was 1,100 people.

The ideal assembly district would contain 20,081 population, and the ideal senate district would contain 84,228. The Board devised 151 single-member lower-house districts and 36 single-member senate districts.

The populations of the assembly districts created by the plan have a maximum deviation from average of +3.93%

and −3.9%, i.e., a deviation of 789 people and 784 people respectively. The average deviation from perfect equality for all assembly districts is 1.9%, and the median deviation is 1.8%.

The populations of the senate districts created by the plan have a maximum deviation from average of +0.88% and −0.93%, i.e., a deviation of 745 people and 787 people respectively. The average deviation of all senate districts is 0.45% and the median deviation is 0.47%.

Of the total of 169 towns in Connecticut, 47 were cut under the plan for assembly districts; 23 for senate districts.

In devising the plan the Apportionment Board gave principal weight to numerical equality in district population and some weight to two additional considerations: an attempt to minimize the cutting of town lines, and an attempt to avoid political unfairness in the sense of creating districts under which a party with a minority of the statewide legislative vote could capture a majority of votes in one or both houses of the legislature. This policy, which has been sometimes referred to as a political balance principle and which might more appropriately be described as a principle of safeguarding opportunity for effective political action by all voters, necessarily involved a knowledge of past election data.

On November 12, 1971, a suit was filed in state court for correction of alleged minor clerical errors or omissions in the plan, and for promulgation of the plan as constitutional for statewide legislative elections in November, 1972. Regarding the alleged omissions there was one instance of apparent noncontiguity and there were three instances of "dropped" population areas caused by a clerical error in describing the area of districts in census terms. *Miller* v. *Schaffer Secretary of the State,* No. 173606, Super. Ct., Hartford County, November 12, 1971, defendants' Exhibits B and C, Trial Trans., Single App., pp. 266-67.

One week after the state court suit was filed, the plaintiffs, on November 18, 1971, commenced this federal suit for a declaration that the reapportionment plan was unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment, bringing suit under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. §§ 1343(3) and 1343(4). In their complaint they claimed the Board had "erroneously applied the one man-one vote doctrine of the Fourteenth Amendment to the United States Constitution to achieve smaller divisions from population equality for the assembly districts than was required by the Fourteenth Amendment, thereby cutting an excessive number of town lines. *Cummings* v. *Meskill*, Complaint, Point 11, Single App., p. 8. They also alleged that with the same percentage deviation as in the plan, fewer towns could be cut. They also claimed that the plan was a political gerrymander in favor of the Republican party, and that some districts lacked compactness.

The defendant, J. Brian Gaffney, intervened in support of the Board's plan to insure adversity because the Attorney General, the state official charged with defense of the plan, was of the same political party as the plaintiffs. He claimed that the Board's plan is constitutional, and that minor inadvertent error and omission and lack of contiguity could easily be corrected, preferably in the pending state court suit. He also urged that the District Court should abstain because of the pending state court action.

The state court suit survived a demurrer by the Attorney General in a ruling on January 17, 1972, thereby expressing the capacity and willingness of the state court to deal with reapportionment. By means of a general notice and addition of parties, this suit was broadened and became coterminous with the issues in the federal suit.

The defendant filed a motion on February 29, 1972, in the federal suit for a preliminary hearing on abstention. At the suggestion of the court this motion was put down for a hearing concurrent with the hearing on the merits scheduled

for March 8, 1972. The District Court declined to hear the abstention motion first, and proceeded to the full case. Single App., p. 183. The Distrct Court filed its Memorandum of Decision on March 30, 1972, invalidating the Board's plan not on grounds of the alleged partisan gerrymandering but primarily on the ground that the Board's consideration of political data in the interest of achieving political fairness was impermissible, and had an assumed impact on population deviations and town line cuts. The court's judgment dated April 4, 1972, permanently enjoined use of the Apportionment Board's plan and appointed a master to devise a new plan of apportionment. Notice of this appeal by defendant Gaffney was filed April 13, 1972.

EVENTS AFTER DISTRICT COURT JUDGMENT

The sequence of events occurring after the District Court judgment of April 4, 1972, is relevant to a full understanding of this case and its present posture before this Court.

1. Appellant Gaffney (Defendant-Intervenor below) filed on May 11, 1972, a Motion for Expedited Consideration and a Jurisdictional Statement (the latter also to serve as Brief in the event the motion was granted). On May 22, 1972, the Motion for Expedited Consideration was denied with the added statement that the Chief Justice, Mr. Justice White, and Mr. Justice Rehnquist "would invite the appellant to file an appropriate motion for a stay." 406 U.S. 942. After the District Court denied a motion for a stay on May 26, 1972, the stay motion was presented to Mr. Justice Marshall, referred by him to the full Court, and granted on June 12, 1972. 407 U.S. 902.

2. During this period and pursuant to the District Court's judgment of April 4, 1972, a Special Master was appointed who prepared an alternative plan for judicial reapportionment for Connecticut. On June 9, 1972, the District Court held a hearing to review the Master's plan. Because the

Special Master had available more refined census data than had been available to the Board, Intervenor-Defendant Gaffney (present appellant), in order to preserve his position, submitted a slightly altered version of the Board plan which incorporated the newly available census data. The details of these plans are relevant only to illuminate the possibilities and constraints flowing from census data, and the consequent difficulty in shaping a simple, easily-applied population equality rule for the nation.

3. Despite the order of this Court staying the adverse judgment of the District Court on the State Plan, the Secretary of the State of Connecticut did not take prompt steps to implement the plan for 1972 elections. In a reapportionment case the normal sequence after grant of a stay is to use the invalidated plan on an interim basis pending disposition of the appeal. The dissent by Mr. Justice Douglas from this Court's stay order of June 12, 1972, was based on this understanding. *See, Fortson* v. *Millican*, 406 U.S. 901, 914 (1972); *Georgia* v. *United States*, 406 U.S. 901, 912 (1972); *Bullock* v. *Weiser*, 404 U.S. 1065 (1972); *Whitcomb* v. *Chavis*, 403 U.S. 124, 140 (1971).

Accordingly, on June 15, 1972, Intervenor-Defendant Gaffney moved the District Court to direct the Secretary of the State to implement the stay order of this Court and conduct the 1972 elections under the State Plan. Appended to this motion was a corrective order regarding three or four clerical transcription errors in the plan as to which there never had been any substantive dispute.[1] The requested court order was designed to satisfy Public Act

[1] Appellees' Complaint viewed the clerical errors as providing grounds to attack the constitutionality of the Board plan. See, Complaint, para. 19, Single App., pp. 13-14. When the matter was presented before the District Court, it was not treated as a constitutional infirmity, but dismissed as a mere technicality—"just a problem of map making"—which could be handled in the State court proceedings. See, Trial Trans., Single App., p. 233.

220 of Connecticut, enacted prior to th stay order of this Court to facilitate use of any possible judicial plan. Public Act 220 authorized the Secretary of the State to conduct elections under a revised time schedul upon receipt of a plan approved by a court of competent jurisdiction. This Gaffney motion was heard and denied by the District Court on June 19, 1972.

4. Thereupon a motion for an order directing the District Court to honor this Court's stay of judgment order, to reinstate the Apportionment Board pla, and to order said State Plan into effect for the 1972 legislative elections was presented to Mr. Justice Marshall on June 20, 1972. This motion was denied by Mr. Justice Marshall on July 6, 1972, and at the request of counsel was presented to the Chief Justice, who denied it on July 18, 1972.

5. At that point the quest for a way to have the people of Connecticut hold their regular state legislative election of 1972, rather than face a carry-over of the 1970 legislature, led the parties back to state court and the suit *Miller* v. *Schaffer, Secretary of the State*, No. 173606, Super. Ct., Hartford County, filed July 27, 1972.[2]

The term "parties" at this point may require some elucidation. Throughout both the state court proceedings and the federal court proceedings, as is the case in most reapportionment suits at least outside the South, the primary antogonists have been representatives of the two major political parties, whether or not explicitly so identified. Because state officials who are nominal defendants in reapportionment suits sometimes find their party loyalties conflicting with their official relation to a redistricting apportionment plan, timely intervention is frequently allowed to ensure adver-

[2] The *Miller* suit had been filed November 12, 1971, but had been effectively forestalled when the District Court denied a motion for abstention. See Statement of Facts, *supra*.

sity.[3] In this action intervention effectively if not explicitly was permitted on behalf of Republican and Democratic interests in the federal and state suits, respectively, the electors identified as litigants being subordinate to their role as representatives of the real parties in interest, i.e. the contending political parties.[4]

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[3] See, *e.g., Scholle* v. *Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962) (Republican state senators allowed to intervene to establish adversity because Democratic Attorney General was the "defendant" in the suit brought primarily by Democratic plaintiffs, and the intervenors assumed the primary burden of defense); *Maryland Citizens Committee for Fair Congressional Redistricting* v. *Tawes*, 253 F.Supp. 731 (D.Md. 1966) (intervention of all congressmen permitted to bring before the court all relevant interests); People *ex rel. Engle* v. *Kerner*, 211 N.E.2d 736 (Ill. 1965), *appeal dismissed*, 384 U.S. 981 (1966) and *Germano* v. *Kerner*, 247 F.Supp. 141 (N.D.Ill. 1965) and *Kirby* v. *Illinois State Electoral Board*, 251 F.Supp. 908 (N.D.Ill. 1965) (intervention permitted which resulted in essentially a Democratic-Republican contest on apportionment); *Wells* v. *Rockefeller*, 281 F.Supp. 821 (S.D.N.Y. 1968) (intervention of political candidates and political party club members allowed to permit particularized challenges to the drawing of individual districts).

[4] The press in its coverage of various stages of this action has not hesitated to characterize the contending interests in terms of major party alignment. See, *New York Times*, Oct. 18, 1972, p. 40, col. 2, "Connecticut Democrats Lose Appeal to the State Supreme Court to Block No. 7 Election"; *The Hartford Times*, Sept. 22, 1972, p. 1, col. 1, "Demos Lose Remap Case"; *The New Haven Register*, Aug. 31, 1972, p. 18, col. 1, "Party Interest Reigns Supreme"; *The Hartford Courant*, July 8, 1972, p. 1, col. 1, "State GOP Rebuffed in Try for Voting Under Remap Plan".

This identification extends to the local counsel who have borne the brunt of defending or opposing the State Plan in whatever forum. Robert Satter served as counsel to the Democrats (majority) and Francis J. McCarthy served as counsel to the Republicans (minority) in various capacities in the Connecticut General Assembly in the 1971-1972 session. Defendant-Intervenor J. Brian Gaffney, intervening here as a voter, was also an assemblyman and chairman of the state Republican party. McCarthy has

Miller v. *Schaffer* was broadened to include a motion for mandamus filed by parties supporting the State Plan on July 27, 1972, and directed against the Secretary of the State. The state court on August 23, 1972, issued a mandamus that the Secretary of the State conduct the 1972 elections under the State Plan, corrected the clerical transcription errors in that plan, and specified a timetable for filings and primaries so that the general election could be held on the regular date of November 7, 1972. The mandamus order was sustained on appeal by the Connecticut Supreme Court on October 17, 1972. (*Miller* v. *Schaffer*, No. 7238, Conn. Law. J., Oct. 24, 1972, p.) the election timetable prescribed by the Superior Court having been adhered to in the meantime by denial of a stay.

6. In the interim between state Superior Court action and state Supreme Court action the "party" opposing the State Plan (the Democrats) sought to obtain from the federal District Court a temporary restraining order and injunction against the Secretary of the State to prohibit her from honoring the Superior Court mandamus order to conduct an election under the State Plan. New plaintiffs were utilized (including prospective legislative candidates), the "new" suit being styled *Ajellow, et al.* v. *Schaffer, Secretary of the State, et al.*, Civil Action No. 15,284, rather than a continuation of the original federal suit, *Cummings* v. *Meskill, et al. and Intervenor-Defendant Gaffney.* Intervention again was allowed so that the "party" (the Republicans) who had obtained the mandamus order against the Secretary of the State in the *Miller* suit could now appear to defend against the threatened federal injunction. After

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served as counsel for the plaintiffs in the state court suit, *Miller* v. *Schaffer, supra*, supporting the State Plan, and as counsel for the Intervenor-Defendant in the federal suit, *Cummings* v. *Meskill*, now on appeal in this Court as *Gaffney* v. *Cummings, et al.* Mr. Satter has served as counsel for certain Intervenor-Defendants in the state court suit, opposing the State Plan, and as counsel for the plaintiffs in the federal suit.

a hearing on September 5, 1972 and again on September 15, 1972, Chief Judge Blumenfeld of the District Court denied the motion for an injunction on September 22, 1972. He found that the necessarily truncated time schedule for the election neither impaired any articulable First Amendment right nor denied due process or equal opportunity to voters or candidates.

7. On September 5, 1972, the *Cummings* federal three-judge panel reconvened to hear a motion by Intervenor-Plaintiffs Aronie *et al.* for an order that the 1972 elections be held under the antecedent 1965 plan of apportionment, based on the 1960 census. This motion was denied on September 8, 1972.

8. The 1972 state legislative elections in Connecticut have been held under the State Plan prepared by the Apportionment Board, restored for this purpose by the stay order of this Court of June 12, 1972 and the supportive state court action described above. The issue on appeal is the federal constitutional validity of this State Plan.

SUMMARY OF ARGUMENT

From whatever standpoint the Connecticut plan of state legislative apportionment is viewed, it is neither unconstitutional on its face nor invalid under any proof of invidious discrimination. Evaluated under the "substantial equality" principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), or the "de minimis" deviation principle of *Swann* v. *Adams*, 385 U.S. 440 (1967), or under an even tighter principle of district population equality keyed to the census-unit-average population, the Connecticut plan has such miniscule deviations as to be presumptively constitutional on its face under the Fourteenth Amendment.

The average population of the available census units (block groups and enumeration districts) used as building blocks by the bipartisan Connecticut Apportionment Board is 1,100; 88 percent of the 2,746 units exceed 400 persons in

population and 570 units exceeded 1,500 persons per unit. Nevertheless the Apportionment Board, operating in good faith to comply with equal population principles of *Reynolds* and *Swann, supra,* and without any preconceived notions of a cut-off point phrased solely in numerical percentage terms, achieved a remarkably tight "equal population" plan. The highest *absolute deviations,* in terms of actual population deviation from ideal, are only 789 people in the assembly districts and 784 people in the senate. These substantially identical figures, which are well under the census unit average, necessarily produce quite different *percentage deviation* figures when applied to large versus small ideal district population quotas. In the Connecticut plan, these very small absolute deviations yield maximum percentage deviations of 0.93% as applied to the 36 senate districts (ideal population 84,228) and of 3.93% as applied to the 151 assembly districts (ideal population 20,081).

The Apportionment Board therefore achieved a degree of numerical equality in population far tighter than needed to eradicate the evil of gross population malapportionment which called into being the seminal cases of *Baker* v. *Carr,* 369 U.S. 186 (1962), and *Reynolds* v. *Sims, supra.* Indeed, to insist as a federal constitutional requirement on even smaller deviations, thus "crowding" the census data even beyond the point of its reliability, would conflict with the oft-expressed concern of this Court that pursuit of population equality not promote gerrymandering or submerge the voting power of elements of the population. *Reynolds* v. *Sims, supra; Fortson* v. *Dorsey,* 379 U.S. 433 (1965). The *form* of equal population apportionment should not be pursued so single-mindedly as to jeopardize the ultimate *function* of fair and effective representation.

It is important to note also the "percentage trap" regarding the interrelationship, as here, of low ideal district population (unavoidable when a state elects to have many small districts for more pin-pointed representation purposes) and relatively high census unit average population. In

Connecticut the absolute deviation figures of fewer than 800 persons, are lower than the absolute deviation figures in many other states, including plans in which appeals were recently dismissed by this Court. (*See, e.g.*, the Pennsylvania case: *Specter* v. *Tucker*, —— U.S. ——, 41 U.S.L.W. 3181 (October 10, 1972) (*appeal dismissed for want of a substantial federal question*).

Such small deviations as presented here would satisfy even the apparent absolute deviation population principle of *Kirkpatrick* v. *Preisler, infra,* and *Wells* v. *Rockefeller, supra.* These congressional districting precedents, however, are not properly applicable in our view to state legislative reapportionment. A more stringent federal constitutionality rule under the Fourteenth Amendment keyed to the census unit average population is not sought by the present appellant, even though on the facts this Board plan would be constitutional under such a rule. The difficulty with a standard of absolute equality is two-fold: (1) it focusses attention on numbers alone long after eradication of significant population malapportionment has been achieved, and does so even though very small population deviations serve no fair representation purpose; (2) it actually can promote gerrymandering by giving reapportioners authority to freely revise district lines on an "equal" basis while privately consulting knowledge of political behavior patterns for partisan gain.

There is a need for a principle of presumptive constitutionality, necessarily expressed case by case rather than as a uniform percentage deviation figure for the nation as a whole. As noted in *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), a percentage deviation, out of context, is incapable of being judged by any articulable standard of invidious discrimination. We have now reached the stage when definitions of some points of presumptive constitutionality are possible. Such definitions are needed to bring order into reapportionment litigation, and to speed the achievement of certainty and finality, with judicial interven-

tion reserved for proven instances of invidious discrimination. We submit that deviations as small as in Connecticut, falling inside the census unit average, necessarily fall likewise inside any reasonable rule of presumptive constitutionality applicable to state legislative districting. Rules of presumptive constitutionality keyed to de minimis deviations in the context of the particular case will enable courts to continue to block significant population malapportionment, without becoming mired in the details of legislative districting.

Even if the population deviations in the Connecticut plan are deemed to fall ouside the per se facet of a needed rule of presumptive constitutionality, the plan nevertheless is still constitutional when justified under *Swann* v. *Adams, supra,* in the light of the "political fairness" principle utilized by the Apportionment Board as a corollary to the preminent principle of population equality. The political fairness or political balance principle in the context of this case has a two-edged effect. First, it supports the bona fides of the Apportionment Board in striving to design districts of "equal population," because that principle, unlike local line preservation, is not intrisically inconsistent with the equal population principle. Second, if some special justification of the miniscule deviations is still deemed necessary, the political fairness concept provides that justification.

The federal equal population principle necessarily overrides virtually every state-recognized representation consideration of a nonpopulation nature, even though these considerations have as their core an anti-gerrymandering spirit, *e.g.,* the anti-town-line-cut policy in the Connecticut Constitution. Once such a policy is necessarily breached, there is no logical stopping point, or any federally-articulable standard of judgment as to which lines to cut or how many. A political fairness policy, however, enters here as the "surrogate" for all such corollary state policies of fair representation. The political fairness or political bal-

ance policy has two pristine virtues: it achieves directly what a specific policy such as a prohibition on local line-cutting achieves only indirectly; it is capable of being harmonized with any degree of equal population stringency.

One of the strongest points of the Connecticut plan is its incorporation of a political fairness principle. That principle not only checks gerrymandering at the outset, it also provides one of the few rational justifications for the location of *any* district line—once substantial abandonment of traditional lines is mandated by the federal equal population principle. As almost a sole surviving principle of rationality in line-drawing, along with population equality, the political fairness concept not only reduces the many options in line-drawing, it also points those options in the right direction—toward effective representation for the largest possible number of voters.

Both on the first and second branches of this argument—demonstration of constitutionality as keyed to numerical equality or to justifications—we assert as fundamental to order and finality in this field the proposition that a mere showing by challengers of an insignificantly less "deviant" plan is not sufficient to overcome such demonstrations of the constitutionality of an official plan. "One-up-manship" in percentage deviation points is hardly a workable constitutional rule. Such an approach does not contribute to apportionment finality, nor does it respond to the *functional* goal of deriving a fair and effective representation system from the *form* of numerical equality in districting. Indeed it invites frequent judicial intervention into the political thicket, absent the knowledge of the representation realities which would be gained by insisting on proof of invidious discrimination.

Because the Connecticut plan is demonstrably constitutional either in the "minimal deviations" branch or the "justifications" branch of the argument above, the only remaining argument left to appellees is to attempt to show in-

vidious discrimination in the actual application of the federal population equality standard, alone or as interrelated with the state policies of political fairness and reasonable regard for town lines (the vast majority of the latter were not cut). There is no evidence in the record to support the assertion of both the appellees and the District Court that the political fairness policy operated to increase the population deviations. Hence, all that is left of this line of attack would be to attempt to surmount problems of justiciability and burden of proof, and to demonstrate invidious discrimination in particular, substantive terms. *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *Burns* v. *Richardson*, 384 U.S. 73 (1966). Such subsidiary issues as town line cuts, or creation of safe districts, once divorced from any demonstrable relation to numerical population equality per se, yield federally cognizable pleas only if shaped into proof of invidious discrimination.

On this record appellees have not grasped this nettle and sought to make any proof of invidious discrimination in any cognizable Fourteenth Amendment sense. This failure indeed may be a tribute to the operation of the Apportionment Board. As the final element in the three-step bipartisan apportionment process authorized by the Connecticut Constitution, the Apportionment Board itself, it may be noted, incorporates an antigerrymandering principle in the very nature of its creation.

In good faith compliance with all relevant state legislative reapportionment precedents Connecticut has developed an apportionment plan not only presumptively constitutional in numerical equality terms but conclusively constitutional because of failure of any proof of invidious discrimination. In the process Connecticut, by interrelating the equal population concept with the political fairness concept, has served both the formal interests in population equality and the functional interests in fair representation which are intertwined in all legislative apportionment or districting cases.

ARGUMENT

I. THE CONNECTICUT REAPPORTIONMENT PLAN FOR THE SENATE AND ASSEMBLY DISTRICTS IN WHICH THE MAXIMUM POPULATION DEVIATIONS ARE LOWER THAN THE AVERAGE POPULATION OF THE AVAILABLE CENSUS UNITS COMPLIES WITH THE FOURTEENTH AMENDMENT WITHOUT NEED FOR SPECIAL JUSTIFICATION; THE PLAN COMPLIES WHETHER THE RULE OF PRESUMPTIVE CONSTITUTIONALITY (ABSENT PROOF OF GERRYMANDERING) BE PHRASED AS A "SUBSTANTIAL EQUALITY" OR "DE MINIMIS DEVIATION" RULE UNDER REYNOLDS v. SIMS AND SWANN v. ADAMS, OR AS A MORE STRINGENT REQUIREMENT

A. AN ABSOLUTE EQUAL POPULATION RULE FOR STATE LEGISLATIVE DISTRICTS IS NOT NEEDED TO ERADICATE MALAPPORTIONMENT AND EQUALIZE THOSE ASPECTS OF VOTING POWER RELATED SOLELY TO DISTRICT POPULATION, NOR DOES SUCH A RULE PROMOTE THE COROLLARY "FAIR REPRESENTATION" PURPOSES ARTICULATED IN REYNOLDS v. SIMS AS THE GOAL OF REAPPORTIONMENT; BY INCREASING DISTRICTING DISCRETION, AN ABSOLUTE RULE CAN PROMOTE GERRYMANDERING

All major new directions in constitutional law take time to grow, mature, and reach stages of refinement when precise standards can be articulated which both preserve the spirit of the innovation and are clear enough to guide the conduct of those affected and limit the surge of litigation and the burden of judicial review. Racial desegregation in education is one prominent example; legislative apportionment and districting is another.

In reapportionment, triggered by *Baker* v. *Carr*, 369 U.S. 186 (1962), the initial thrust was to combat the gross population disparities among districts which imbalanced voter power and representation on a geographic basis. At the time of *Baker*, a dozen states had at least one state legislative district which deviated more than 500 percent from ideal population. Maximum deviations of at least 50 percent were

very common.[5] By invoking the "substantial equality" rule of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this problem was quite quickly terminated.[6] (See, Appendix A to this Brief, State Malapportionments—1964.)

At the same time, it was recognized from the outset that the relationship between the *form* of apportionment and the *function* of representation is complex. It was sensed that if the result of achieving the perfect form of apportionment through strict numerical equality in districting is concurrently to enhance the ease and subtlety of the gerrymander, then the purpose of reapportionment is lost, effective representation disappears, and the exercise becomes futile. Accordingly, we find Chief Justice Warren, speaking for the Court in *Reynolds* v. *Sims*, at the level of principle and purpose, saying:

> "[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." 377 U.S. 533, 565-66 (1964).

While insisting properly on substantial equality of population in districting as the foundation principle, the *Reynolds* opinion is full of caveats all going to the basic proposition

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[5] David and Eisenberg, "Devaluation of the Urban and Suburban Vote: A Statistical Investigation of Long-Term Trends in State Legislative Representation," University of Virginia Bureau of Public Administration, 1961; Baker, *Rural Versus Urban Political Power* (1955); Dixon, *Democratic Representation: Reapportionment in Law and Politics* 59-90 (1968); McKay, *Reapportionment: The Law and Politics of Equal Representation* 275-458 (1965).

[6] See dissenting opinion of Mr. Justice White in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U.S. 542, 553-56 (1969), stating that this problem of geographic malapportionment can be prevented as readily under a "substantial equality" principle as under a "zero variation" principle.

that: "Mathematical exactness or precision is hardly a workable constitutional requirement." 377 U.S. at 577.[7]

This "form-function" distinction in regard to the goal of fair representation found explicit recognition in two cases following *Reynolds* which raised, as *Reynolds* did not, the question of the impact of formal choices in districting on the effective representation interests of political and racial groups of voters. In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965)[8] went out of its way to preserve the question whether districting form (multimember districts in this instance) could unconstitutionally subvert the representation function saying:

> "It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U.S. at 439.

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[7] As Justice Douglas put it in *Wright* v. *Rockefeller*, 376 U.S. 52, 59 n. 1 (1964), decided in the same year as *Reynolds* v. *Sims*, *supra*: "Nor does the Constitution require a scheme for exact equality in districting, let alone a 'mathematically-based procedure for districting which produces contiguous districts nearly equal in population.'" And he went on to cite disapprovingly a computer program for a simple population-based districting.

[8] In *Fortson* plaintiffs sought to overturn Georgia's mixed system of multimember districts and single-member districts, but they argued only that the mixture produced invidious discrimination because voters in the single-member districts chose one man whom they could control, whereas voters in the multimember district (even where the district was subdivided for candidate residence purposes as in Georgia) had no such control over the man resident in their area because the election was at-large and district-wide vote controlled all seats.

However, Mr. Justice Douglas, dissenting, 379 U.S. at 440, did find invidious discrimination, a conclusion necessarily resting on acceptance of the proposition that "representation" involves more than formal population equality in districting.

This statement was repeated in *Burns* v. *Richardson,* 384 U.S. 73 (1966) where the issue was raised, and likewise in *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971),[9] the refusal to invalidate in each instance being based on plaintiff failure of proof, rather than rejection of the principle. Because the focus of the Court's concern in the statements in these cases is actual voting strength, in nonpopulation equality context, these statements evidence a general constitutional concern that any districting form not subvert the effective representation function.

The early post-*Reynolds* litigation eliminated gross population malapportionment, and recent contests under the substantial equality rule have concerned smaller deviations. Indeed current disputed deviations are far smaller than those now considered significant in Great Britain which in pre-*Baker* times was often pointed to as a model of rectitude for the benighted, erring ex-colonies.[10] It is significant that more than 70 percent of all constituencies in England's 516 seat share in Parliament have significantly larger population deviations than have the most deviant constituencies of the Connecticut plan before this Court.[11]

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[9] See the phrasings of the principle in *Whitcomb* at 403 U.S. 143-44, and, in specific racial context of that case, at 403 U.S. 149.

[10] McKay, *supra,* at 29-34.

[11] The reapportioning function in Great Britain has been placed by Parliament (Redistricting of Seats Acts of 1949 and 1958), with four Boundary Commissions for England, Scotland, Wales and Northern Ireland, respectively. The Commission is composed of several members who attain membership by virtue of their position in the governing party or by appointment by one of several government ministers. The current English apportionment was accomplished by the Boundary Commission in 1969 after a labor of four years. Boundary Commission for England, *Second Periodical Report* 2 (1969). The population principle, although nominally the basis for the apportionment, was modified by certain Boundary Commission policies concerning effective representation, *e.g.*, that "local ties were of greater importance than strict mathematical equality." *Id.* at 5. Indeed, it was even thought that the relative

Gross malapportionment produced easily visible defects in the political representation process by overrepresenting the voice of small town and rural districts, and underrepresenting the voice of large cities and suburbs.[12] State legislatures were widely criticized as being unresponsive to modern problems.[13] In this era, unresponsive government generally was viewed as a function of gross population malapportionment, and reapportionment was sought not merely to change *numbers* but to affect the *quality* of government.[14] No similar corollary, either actual or in the popular mind, exists between the miniscule population deviations now being contested and the quality or effectiveness of representation. Responsibility and responsiveness are reached as well at a 10-15 percent maximum deviation level (especially if the deviations in the typical districts are far smaller) as at a 1-5 percent level. Indeed, there is discouragingly little evidence from the several available post-*Reynolds* empirical studies of any close cause and effect relationship between

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compactness of urban districts enabled them to "more conveniently support large[r] electorates" than their rural counterparts. *Id.* at 6. The average or ideal population being 58,190, the Commission fixed a goal of placing 70-80% of all constituencies within a 50,000 to 70,000 range (yielding maximum deviations of +14.7% and —20.3%). The smallest and largest constituencies deviated from the ideal by 33.2% and 36.0% respectively, yielding a total variation of 69.2%.

[12] Baker, *Rural Versus Urban Electoral Power* (1955).

[13] See Charles Press and Charles R. Adrian, "Why Our State Governments Are Sick," 1964 *Antioch Review* 149-65, stating that lack of "timeliness" was the major problem facing state government.

[14] Reapportionment had the additional result of putting an end to the practice of using the old scapegoat of "malapportionment" as the excuse for "unsatisfactory" governmental policies. If there is no change under reapportionment, the people have only themselves to blame, or problems may be truly intractable. In either event responsible government results, and this benefit of reapportionment is not strengthened by insisting on absolute numerical equality.

reapportionment and the character and variety of legislative output.[15]

The dominant present concerns in reapportionment are to devise rules to achieve finality in the apportionment process with minimum litigation, and to avoid "malrepresentation" of significant groups of voters by the manner of line-drawing in the new "equal" districts. To be sure, many elements of malrepresentation, for which gerrymandering is a loose general label, lie beyond effective judicial purview. Nevertheless the *population* standard, which *is* within judicial purview, should not be handled in such fashion as to:

> (1) ease the path of the gerrymanderer by giving him carte blanche to ignore all districting considerations save population equality, while privately consulting his partisan knowledge in a wholly partisan spirit;[16] or
>
> (2) encourage plaintiffs to upset sound and tight reapportionment plans which are the product of a bipartisan board following a political fairness principle as in Connecticut, merely on a showing that a bit more juggling of census units could produce a plan with an insignificantly lower population deviation.

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[15] Dye, *Politics, Economics, and the Public: Policy Outcomes in the American States* 273 (1966); Hofferbert, "The Relation Between Public Policy and Some Structural and Environmental Variables in the American States," 60 *Am. Pol. Sci. Rev.* 73, 81 (1966); Bicker, "The Effects of Malapportionment in the States—A Mistrial," in Polsby, ed., *Reapportionment in the 1970s* (1971); Cantrall and Nagel, "The Effects of Reapportionment on the Passage of Non-Expenditure Legislation," a paper presented to the Conference on Democratic Representation sponsored by the New York Academy of Sciences, New York, New York, November 1-3 (1972).

[16] *See, Reynolds* v. *Sims, supra* at 578-79, warning against an "open invitation to partisan gerrymandering"; *Kirkpatrick* v. *Preisler, supra* at 553-56 (White, J., dissenting), noting that "zero variation" enables legislatures "intent on minimizing the representation of selected political or racial groups" to range freely in line-drawing "so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect."

An absolute population equality rule points squarely in the wrong direction, and in addition poses practical problems not yet fully explored. Census data are not accurate enough or consistent enough to sustain an absolute population equality rule, as the Bureau of the Census would be the first to admit.[17] It would be a tragedy for the reapportionment movement to end prematurely in a tyranny of numbers, forever litigated formally on a "one-ups-man-ship" basis, with the real representation interests concealed.

The need is to develop a concept of "presumptive constitutionality" when minimal population deviation has been achieved. *Swann* v. *Adams*, 385 U.S. 440 (1967), with its concept of *de minimis* deviation points the way. In refining the concept we must bear in mind constraints of census data, the varying size of the districts being constructed, and consequent inappropriateness of applying a single percentage rule of thumb to all situations. In *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), this Court rejected any attempt to define *de minimis* in terms of *fixed* percentage population deviations:

> We reject Missouri's argument that there is a *fixed* numerical or percentage population variance small enough to be considered *de minimis* and to satisfy with-

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[17] Siegel and Zelnik, "An Evaluation of Coverage in the 1960 Census of Population By Techniques of Demographic Analysis and By Composite Methods," in *Proceedings, American Statistical Association* (1966); Siegel, "Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications," in Heer, ed., *Social Statistics and the City* (1968). The authors of the first study after a careful analysis conclude at p. 79 that "we know little in a formal manner regarding the reasons for underenumeration or the geographic variations in coverage error." The second study, after noting significant underenumeration of parts of the nonwhite population, concludes at p. 40 that "serious distortion does occur in the figures for many smaller geographic units within the country," such as particular census tracts and enumeration districts where the affected groups may be concentrated.

> out question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with the adoption of fixed numerical standards which excuse population variances *without regard to the circumstances of* each particular case. 394 U.S. at 530 (Emphasis added).

The appellants do not urge acceptance of a fixed percentage as a way of articulating a *de minimis* standard. The type of analysis which we believe germane in determining whether or not a particular plan should be supported by a presumption of constitutionality is inapposite to such an artificial approach. *See,* Section I-B, *infra.*

Reapportionment must be directed toward the goal of substantial population equality.[18] But neither the presumptive constitutionality nor actual operation of a particular plan can be judged on the plan's percentage deviations in the abstract. The focus for inquiry necessarily must be broader than a mere looking at a deviation figure; as to it standing alone no standard of judgment is available, absent the discredited idea of a single, universally applicable percentage figure. The focus for inquiry necessarily must be on the *circumstances* existing at the time the plan was drafted: the census data, the policies. The Connecticut Bipartisan Reapportionment Board did not proceed from any preconceived notion of the outer constitutional limits of population

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[18] *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 538 (Fortas, J., concurring). "In considering whether the State has 'approximated' an equal division and allocation of the population, I sympathize with the majority's view that a *de minimis* rule of allowable disparities tends to demean in theory and in practice the constitutional objective because it suggests that it is not necessary even to aim at equality. On the other hand, to reject *de minimis* as a statement of the limits on the rule of equality should not lead us to toss aside the wise recognition of the inscrutability of fact and the imperfection of man which is implicit in the *Wesberry* standard: 'as nearly as practicable.'"

deviation.[19] Rather, the plan was constructed by working and reworking census data in the light of three fundamental principles:[20]

> A. (Saden): I recognize the controlling factors, the one man-one vote of Reynolds v. Sims case.
>
> A secondary factor was the attempt in the House to minimize, within reasonable limitations, the number of town line cuts or segmentations, as you may say.
>
> And third I thought that as a corollary of the one man-one vote principle a plan that would be fair would be one that would react as closely as possible in the composition of the respective House or Senate to the actual plurality of vote on the House or Senate lines in a given election.

The judicial standard for presumptive constitutionality must be directed at determining how well the Board plan achieved its stated objectives in the context of the available census data.

State legislative reapportionment needs the development of constitutional rules presumptively validating plans worked out by bipartisan state agencies in a spirit of fairness, provided the population deviations are minimal (*e.g.*, fewer than 800 persons deviation in either house in Con-

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[19] In testimony before the district court, Judge Saden emphasized that the Reapportionment Board did not work from any set of preconceived percentage deviations. "The deviation factors didn't come into the picture until after I had submitted, in the first instance, a Senate plan which had been worked out into deviations. And that plan came out to a deviation factor of less than 1 per cent maximum and minimum." Trial Trans., Single App., at 262-63. Although the district court did not make any special finding concerning this point, the issue was raised and decided as a matter of fact in *Miller* v. *Schaffer*, No. 173606, Super. Ct. Hartford Cty, August 23, 1972, at page 7. "In sum, the Board made the best judgmental adaptation to harmonize federal and state constitutional precepts. It did not aim for an acceptable mark or goal of percental deviation less than equal population. The Board tried to bring the deviation as close to equal population as it could, with a built-in choice of House size most suitable for reasonable respect for town integrity."

[20] Trial Trans., Single App., at 264.

necticut).[21] If the plaintiffs cannot show that the levels of presumptive constitutionality applicable to the particular case have been exceeded, then all courts should stay their hand, unless plaintiffs prove particularized invidious discrimination under the formula of *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), reiterated in *Whitcomb* v. *Chavis*, 403 U.S. 124 1972). With such an approach courts still can block significant population malapportionment. And they will enter the political thicket of representation realities only on an informed basis with the benefit of particularized proof.

B. GIVEN THE LIMITATIONS OF CENSUS DATA AND CENSUS MARGIN OF ERROR, THE DEVIATIONS IN THE CONNECTICUT PLAN ARE PRESUMPTIVELY CONSTITUTIONAL

The determination under the Fourteenth Amendment that a particular reapportionment plan falls outside the range of presumptive constitutionality is in effect an evidentiary conclusion that the impact of the plan is per se discriminatory. To reach such a finding as a matter of law, it is not sufficient for courts to respond in a visceral manner to abstract percentage deviations. Such a finding would be especially unfortunate in the context of Connecticut reapportionment where population deviations, objectively viewed, are a very close approximation to the minimum degree of variance feasible under the constraints imposed by the manner of reporting census data.[22]

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[21] A rejection of a challenge to a plan similarly devised by a bipartisan commission in Pennsylvania was recently approved by this Court. *Specter* v. *Tucker*, — U.S. —, 41 U.S.L.W. 3181 (October 10, 1972) (*appeal dismissed for want of a substantial federal question*). See *Commonwealth ex rel. Specter* v. *Levin*, 293 A.2d 15 (1972).

[22] Census errors and undercounts result from a number of factors. In the 1960 census there was a major undercount of some parts of the nonwhite population, affecting differing areas in differing degrees. See Siegel, "Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications," in Heer, ed., *Social Statistics and the City* (1968).

The reapportionment process involves the working and reworking of census units—block groups and enumeration districts. Each of these building blocks has an internal margin of error, and in turn cannot be divided in an attempt to achieve "absolute" district numerical equality without making unsupportable assumptions.[23] The problem of inaccuracies in census reports, therefore, cautions against abandonment of the *de minimis* approach and insistence on absolute equality, which may not be reachable even in *census* terms. Such an approach could easily push the nominal "equality" below the census margin of error.

The outstanding aspect of the Apportionment Board's work is that it devised districts for both houses in which the population of even the most deviant districts varies from the ideal population *by less than the average popula-*

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[23] One aspect of the problem of working with block groups and enumeration districts is brought out in this colloquy between Judge Blumenfeld and Plaintiff-Appellees' expert, Mr. Vocelli:

Q. (Judge Blumenfeld): When you say a group, a census group—is that what you talk about? A. (Vocelli): Right. In other words, when you draw a plan first you sit down with a map, a small map, generally speaking, and you draw up combinations of towns in which you think you might be able to fit so many districts.

Q. (Judge Blumenfeld): But a group consists of how many units, how many persons? A. (Vocelli): Well, that really varies.

Q. (Judge Blumenfeld): That varies, too? A. (Vocelli): Right. And sometimes when you try to draw one of these districts within your original combinations *sometimes you can't get the exact population you're seeking* because these block groups, as they are called, they are the smallest building blocks we had. They ranged anywhere from, I believe the figures are, 1—

Q. (Judge Blumenfeld): But you have to divide a group then to get mathematical exactness and there's no way of knowing who— A. (Vocelli): Well, that's right. *We didn't want to cut any census block groups because then we would be making assumptions that may not be correct.* In other words, we wanted to adhere strictly to census data that was available in time. We didn't want to make any rash assumptions as to estimates by cutting block groups. (Emphasis added.) Single App., p. 235.

tion of the census units available. (See Appendix B to this Brief: Connecticut Census Data and Population Distribution of Districts.) The average size of the 2,746 census units (block groups and enumeration districts in the initial census report) is 1,100 with 88% of the units exceeding 400 population and 570 units exceeding 1,500 population. Nevertheless, the Board produced a plan in which the maximum absolute deviation from the ideal in terms of numbers of persons involved is only 789 persons in the assembly and 787 persons in the senate. Given the practical difficulties with the available building blocks of 1,100 people and the fact that the Connecticut plan has no district whose population deviates by more than 789 people, no tighter plan could reasonably be required under a *de minimis* standard. Whether in fixing the line of presumptive constitutionality this Court would wish to adopt such a tight standard as a showing of deviation lower than census unit average (and it may be deemed too tight in some situations), such a level has an aspect of certainty and neatly fits the facts of this case.[24]

An ingenious challenger, by reshuffling census units slightly or by making various assumptions on how to split census units, can easily produce a plan with slightly lower population deviation. Such a process, which would be invited by rejecting a *de minimis* cut-off point, would rest on the theory that everything was expendable save the population factor. The process could continue all the way down to a purported zero deviation, as to which there still could be dispute flowing from census data inaccuracy or corrected reports. To insist on going below census unit average in order to achieve the level of presumptive constitutionality would reduce constitutional law to the level of shadow-

[24] *Reynolds* v. *Sims*, 377 U.S. 533, 578 (1964), where Chief Justice Warren anticipated a case-by-case determination of the concededly imprecise contours of the basic substantial equality principle within the context of the varying fact patterns presented by different reapportionment suits.

boxing, and would rest on wholly unsupportable assumptions concerning the relationship between apportionment form and representation function.

In constructing a meaningful "presumptive constitutionality" or "de minimis" principle, it is vital to consider the census data in relation to district size to avoid the *percentage trap.* This trap is well illustrated by the Connecticut case. For example, let us hypothesize that a casual observer has been told that in Connecticut the maximum percentage deviation in the house was 3.9% and in the senate 0.9%. It would appear to him that the house districts were not as tightly constructed as the senate districts, and yet this would be an absolutely false conclusion. The number of persons differing from the norm is the same in each house. The census data with units averaging 1,100 persons each has been "pushed hard" by the Apportionment Board so that even the most deviant district differs from the ideal by fewer than 800 persons. And yet, because assembly districts are small with approximately 20,000 population and the senate districts are large with approximately 84,000 population, the same maximum *absolute deviations* of fewer than 800 persons produce maximum *percentage deviations* of 3.9% for the small assembly districts and 0.9% for the large senate districts.

Significantly, of the 16 currently valid lower house reapportionments whose maximum percentage deviations exceed the Board's plan for the Connecticut Assembly, eleven may be said to have relatively small (25,000 or less) average district populations and have encountered similar difficulties in arriving at a plan with very low maximum population deviations.[25]

If Connecticut were a large state like New York or Ohio, where even the lower house districts exceed 100,000 population and the senate districts exceed 300,000, the percent-

[25] The National Legislative Conference and the Council of State Governments, *Reapportionment in the States* 30-31 (1972).

age deviation resulting from the same 800-person absolute deviation would fall to 0.8% for a 100,000 district and to 0.266% for a 300,000 district. An 800-person deviation in a large 400,000 population congressional district would produce a percentage deviance of merely 0.20%. It would be almost incredible to conceive of a court holding an 800-person *absolute* deviation from ideal (and the resulting tiny *percentage* deviation) to be in excess of a "presumptive constitutionality" standard for such large districts. How then can there be any concern for the 3.9% percentage deviation in the small Connecticut assembly districts, when such larger percentage deviation is produced by the same 800-person deviation which allows tiny percentages in the larger districts?

The Constitution does not mandate that the most *numerically* perfect plan capable of being constructed be adopted. *See, Abate* v. *Mundt,* 403 U.S. 102 (1971). A 3.9% deviation *in the Connecticut context* is well within a meaningful standard of presumptive constitutionality, suggested by this Court in *Swann* v. *Adams,* especially when that deviation is related to the small absolute size of the deviation in terms of persons involved—fewer than 800 persons per district.

C. POST-1970 CENSUS REAPPORTIONMENTS IN OTHER STATES CONTAIN LARGER DEVIATIONS BOTH IN ABSOLUTE TERMS AND PERCENTAGE TERMS THAN CONNECTICUT

1. The National Pattern Summarized

Since the beginning of 1970, forty-five states have reapportioned at least one of their legislative houses. Of the forty-five upper house reapportionments, five have been declared unconstitutional although not necessarily finally. Of the remaining forty houses which to date have not been challenged successfully, if challenged at all, thirty-four houses (*85%*) have deviations greater than in the Board plan for the Connecticut senate either with respect to

maximum percentages[25a] (twenty-nine houses), or maximum persons[25b] (twenty-nine houses), or both (twenty-four houses).

Of the forty-two lower houses reapportionments, six have been declared unconstitutional although not necessarily finally. Of the remaining thirty-six which to date have not been challenged successfully, if challenged at all, twenty-one houses (*58%*) have deviations greater than in the Board plan for the Connecticut assembly either with respect to maximum percentage (sixteen houses), or maximum persons (seventeen houses), or both (twelve houses).[26]

2. Reapportionments in Selected States

In Pennsylvania, the state's constitutionally authorized bipartisan Legislative Reapportionment Commission devised a reapportionment plan which was attacked, *inter alia*, on population equality grounds. Of fifty senatorial districts, the smallest (231,172) and the largest (241,360) deviated from the ideal district population by 2.02% and 2.29%, respectively. Of 203 house districts, the smallest (56,675) and the largest (59,845) deviated from the ideal district by 2.48% and 2.98%, respectively. *Commonwealth ex rel. Specter* v. *Levin*, 293 A.2d 15 (1972), *appeal dismissed for want of a substantial federal question*, — U.S. —, 41 U.S.L.W. 3181 (October 10, 1972). (Appellant's Jurisdictional Statement, pp. 26-31, specifically presenting the population inequality claim). The Pennsylvania Supreme Court's decision, sustained by this Court by its dismissal of the appeal, characterized the foregoing deviations as "minimal" and held that "the deviations clearly do not

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[25a] *I.e.*, with at least one district deviating from the ideal by more than 0.9%, as in Connecticut.

[25b] *I.e.*, with at least one district whose population deviates from the average district population by more than 789 persons, as in Connecticut.

[26] The National Legislative Conference and The Council of State Governments, *Reapportionment in the States* 28-31 (1972).

dilute the equal-population principle 'in any significant way.'" 293 A.2d at 15. And yet the absolute deviations are significantly higher than in Connecticut—the most deviant Pennsylvania senate and house districts having deviations from the ideals (235,878 and 58,098) of 5,482 and 1,747 persons, respectively.

Both the house and senate districts in the Ohio apportionment plan, in which this Court dismissed an appeal on other grounds, have larger absolute deviations in terms of number of persons involved than in the Connecticut plan. *Jordan v. Norris*, — F.Supp. — (N.D. Ohio 1971), *appeal dismissed for want of jurisdiction*, — U.S. —, 41 U.S.L.W. 3181 (U.S. October 10, 1972). These deviations are larger than could have been obtained if the ex-officio Ohio Apportionment Board had adhered as closely to census units as did the Connecticut bipartisan Apportionment Board.

In the Ohio case the relevant population facts gleaned from the plaintiffs' complaint are that because of Ohio's large population the ideal size for any of the 99 house districts would be 107,596 and the ideal size for any of the 33 senate districts would be 322,788. With districts of this size, one would expect substantially lower percentage deviations than the 0.9% achieved for the 84,000 population Connecticut senate. That is not the case, even though in Ohio the reapportioners had available the final census report, subdividing the block groups and the enumeration districts into blocks, which data was not available for Connecticut. Even with use of this more finite block data, the Ohio maximum deviations from the ideal in *percentage* terms are as high as those for the Connecticut senate, i.e., for the Ohio house the deviation is 0.998%, and for the senate 0.936%.[27] The absolute deviations in terms of num-

[27] *Jordan* v. *Mahoning County Board of Elections*, No. C 71-1130Y, United States District Court for the Northern District of Ohio, Complaint for Declaratory Judgment and Injunctive Relief and Request for Three Judge Court. See also in this case the Stipulations document.

ber of persons involved are larger than the Connecticut deviations of under 800 persons, the comparable Ohio figures being 3,022 persons for the senate and 1,074 for the house.[28]

It also may be noted that in Ohio the state constitution calls for grouping three house districts to construct one senate district. The policy precludes the attempt, made in Connecticut, to construct senate districts on an equal population basis as nearly as practicable. We are not arguing that such a nonpopulation policy is unconstitutional, even though it guarantees that absolute deviations in the senate will be three times higher than otherwise could be achieved. However, finding room for such a "rational state policy" requires adopting something less than an absolute population equality rule.

The New York legislative apportionment is another case in point. This plan has been sustained in the lower state courts and is now on appeal in the New York Court of Appeals. *In the Matter of Petition of Schwartz,* 300 N.Y.2d 664, 332 N.Y.S.2d 100 (App. Div. 1972), *appeal pending,* Court of Appeals, No. 659-72. For both the New York house and senate the number of persons by which the most deviant district differs from ideal is greater than in Connecticut. For the New York senate, with an ideal size of 304,021, the absolute deviation is 2,795 persons, yielding a percentage deviation of 0.91%. For the lower house with an ideal size of 121,608, the absolute deviation is 2,206 persons, yielding a maximum percentage deviation of 1.81%.[29]

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[28] The actual absolute deviations in Ohio may be even larger than those indicated. The Ohio reapportioners were required by the state constitution to use ward and precinct lines for constructing districts, rather than census unit lines. Such local lines are frequently non-contiguous, with legislative district lines cutting across census blocks. In such instances, the district population figures reported must be estimates.

[29] Interim Report of the Joint Legislative Committee on Apportionment, Albany, New York, December 14, 1971, pp. 8, 36 and 47.

D. THE CONGRESSIONAL DISTRICTING PRECEDENTS AND STATE-LOCAL APPORTIONMENTS

1. Kirkpatrick and Wells Are Not Relevant in Shaping a Presumptive Rule of Constitutionality for State Legislative or Local Apportionments

The congressional districting cases of 1969, *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), do not require a different conclusion even though they have influenced some lower courts and state legislatures which have pushed population deviations down toward a minisecule 1 or 2 percent or less. There are several grounds on which the apparently absolute population equality rule of these cases may be distinguished from state (and local) reapportionment.

Congressional redistricting rulings are based not on the equal protection clause of the Fourteenth Amendment, but on Article I, Section 2 of the Constitution.[30] There was a difference in the initial phrasings of the equality standards: equal "as nearly as is practicable" for congressional districting; "substantial equality" for state legislative reapportionment with many caveats added in the course of the opinion (see *Wesberry* v. *Sanders*, 394 U.S. at 566; *Reynolds* v. *Sims*, 377 U.S. 533, 579 and see caveats at 577-81). Whether or not this difference was intentional (and Justice Black's subsequent opinion in *Hadley* v. *Junior College District*, 397 U.S. 50, 56 (1970), intimates that it was unintentional), there are logical reasons for a slightly looser rule for state legislative reapportionment and local government districting than for congressional redistricting.

Particularized local interests relate more to state government than to the national government. The greater

[30] Article I, Section 2 relates only to congressional districting and specifies the population factor. By contrast, state-local districting rests on Section 1 of the Fourteenth Amendment which mentions neither representation nor population but specifies a nondiscrimination (equal protection) principle.

number of districts (in Connecticut, 151 lower house districts, 6 congressional districts) make it more feasible to represent those interests in the state legislature than in Congress. Because large congressional districts transcend so many conventional communities of interest, the precise point where their boundaries fall is of less significance than regarding state and local legislative districts. See, *e.g.*, *Abate* v. *Mundt*, 403 U.S. 102 (1971).

Recognition that the foregoing fact warrants some modest flexibility in the population equality rule is found in the opinion of the New Jersey Supreme Court in *Jackman* v. *Bodine*, 55 N.J. 371, 262 A.2d 389 (N.J. 1970):

> Nonetheless the county and the municipality are the meaningful units in state-local relations in many . . . governmental coordination needs, which in many respects are present also between local and state governments.[31]

As discussed above, the larger the population of the districts being constructed the easier it is to report a small *percentage deviation*, even though *absolute deviation* in terms of number of persons involved may be substantial. Congressional districts, averaging 400,000 persons each, are the preeminent example. Deviations of 1%, 2%, 3% and 4% in congressional districting produce absolute deviations—*i.e.*, the number of persons by which a district differs

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[31] This comment echoes the following statement in *Reynolds* v. *Sims*:

> "Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. • • • Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting." 377 U.S. at 578.

from ideal—of 4,000, 8,000, 12,000 and 16,000 persons. A 10% deviation would produce an absolute, or body deviation of 40,000. For congressional districts, therefore it may be feasible or appropriate to insist on small percentage deviations because of the large number of persons represented by each 1% of deviation, and because of the ability to achieve smaller deviations without "pressing too hard" on the available census data.

By contrast, in constructing the small 20,000-population Connecticut assembly districts with census units averaging 1,100 persons the Apportionment Board held the maximum absolute deviations under 800 persons, and held the average absolute deviations under 400 persons. This yielded a percentage deviation of 3.9%, which might sound high if the congressional district ruling of *Kirkpatrick-Wells* were applied. But such application would be clearly inappropriate logically, and would most certainly advance no cause of fair or improved representation.

If these distinctions fail, so that the apparent insistence in *Kirkpatrick* and *Wells* on juggling census units until no further juggling is possible (or on cutting census units and estimating population which has occurred in some states) then it certainly is time to consider modifying the rule of those cases. Under our view of the matter, however, the *Kirkpatrick* and *Wells* precedents are simply not relevant to the Connecticut state legislative situation, and should have no part in shaping a presumptive rule of constitutionality for state legislative apportionments.[32]

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[32] In *Connor* v. *Williams*, 404 U.S. 549 (1972) this Court recently has specifically reserved the question whether the seemingly absolute numerical equality principle of *Kirkpatrick* and *Wells* applies to state legislative reapportionment. At issue was a Mississippi plan in which for the senate the maximum percentage deviation was 9.6 percent, and the *absolute* deviation was *strikingly higher* (4,086 persons) than in the Connecticut senate. For the Mississippi lower house the percentage deviation was even higher, 9.9

2. If the Kirkpatrick and Wells Precedents Are Not Deemed Distinguishable It Is Time To Consider Modifying the Rule of Those Cases

If the foregoing considerations and distinctions are deemed to be insufficient to shield state legislative apportionment from the full impact of the apparent absolute equality rule of *Kirkpatrick* and *Wells*, the rule itself must be strongly questioned.[33] In the first place, the four dissenters from that rule raised serious objections to it which have not been resolved either by logic or experience. The dissenters touched on the countless equal (but politically different) plans a computer following bare population equality can produce, the increased gerrymandering possibilities once local subdivision lines are ignored in pursuit

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percent, and the absolute deviation was 1,799.6 persons (prorated in a multimember district situation where the ideal single-member district population quota would be low (18,171) just as in the Connecticut lower house. The Court, per curiam said:

> "Appellants rely on our recent cases invalidating congressional redistricting statutes that contained total variations of 5.97%, *Kirkpatrick* v. *Preisler* . . . and of 13.1%, *Wells* v. *Rockefeller*, between the largest and the smallest districts. These decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment. . . . If we are to consider the applicability of *Preisler* and *Wells* to state legislative districts, it would be preferable to have before us a final judgment with respect to the entire State." 404 U.S. 451-52.

[33] Although objecting strenuously to the phrasing of an absolute equality rule, Mr. Justice Fortas concurred in *Kirkpatrick* because of the failure of the Missouri legislature to use accurate 1960 census figures, or systematically-obtained new figures for all districts. 394 U.S. 540. He concurred in *Wells* because of New York's policy of seeking equality in terms of regional groupings of districts, rather than on a direct interdistrict basis. 394 U.S. 549. In the basic "equality" rationale of these two cases, therefore, Justice Fortas can be classed as one of the four dissenters.

of absolute population equality, and the need to moderate numerical exactness with a tolerance for reality.[34]

It is also noteworthy that the decisions in *Kirkpatrick* and *Wells* were greeted with some consternation by experienced observers of the apportionment scene, including some participants in the litigation itself, political science specialists, and a high staff member of the National Municipal League.[35]

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[34] The dissent of Mr. Justice White warned that absolute equality downgrades a restraint on the gerrymander, which he said is a greater threat to "equality of representation" than was malapportionment. "Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality. . . ." 394 U.S. 555. He also perceptively observed that if "county and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, one differing very little from another, but each having its own very different political ramifications." 394 U.S. 556.

This last thought was echoed in the dissent of Mr. Justice Harlan, joined by Mr. Justice Stewart, in the observation that "Legislatures prefer to follow traditional county and regional lines so that the demands of blatant partisanship will be tempered by the constraints of history and tradition." Justice Harlan hypothesized that under the freedom of an absolute equality rule, the district lines even more than in the past "are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs." 394 U.S. 552.

Mr. Justice Fortas observed that the *Wesberry* standard "as nearly as practicable" does not refer merely to arithmetical possibilities. In an admittedly hyperbolic statement he suggested that an inflexible insistence upon mathematical exactness, "with no tolerance for reality" or "the boundaries of common sense," could lead to running a district line through a large apartment house.

[35] Plaintiff David Wells in *Wells* v. *Rockefeller* was not seeking absolute population equality; his own alternative plan contained deviation from average of 4.7 percent. He feared that the new numbers-only focus "unless subsequently altered or refined or clarified in some way, can indeed open the way to egregious gerrymandering." Mr. Wells' counsel, Dean Robert B. McKay of the

Writing reflectively three years after his "victory" in the *Wells* case, and deploring the absolute equality rule, David I. Wells had this to say:

> Not only has the Supreme Court failed to face up to the fact that gerrymandering and numerically unequal districts are merely two ways of achieving the same objective of unwarranted political advantage; a series of Supreme Court decisions in 1969 actually made the problem worse. From 1964 until 1969, the court required merely that districts have approximately equal populations. In the latter year, however, it changed its approach to a demand for almost precise numerical equality, even if that meant ignoring natural boundaries, county lines, city lines, geographic compactness and even the boundaries of common sense, as one dissenting Justice put it. To allow districts to have con-

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New York University Law School, observed that "one is left with an uneasy feeling that the majority has settled too quickly for a simplistic, formula based on numbers alone. The prospects are not entirely encouraging."

Two political science specialists in reapportionment shared this worried reaction. Professor Malcolm E. Jewell of the University of Kentucky observed that "existing political subdivisions do have some sense of community and community interest," and hypothesized that "legislatures are less likely to be visible and identifiable to their constituents if legislative district boundaries are completely independent of other existing city and county boundaries." Professor Gordon E. Baker of the University of California at Santa Barbara worried about the prospects for achieving fair and effective representation under an absolute population equality rule. He expressed the hope that the ruling would be "narrowly construed so that the extent to which equality might be practicably achieved both in state, legislative and congressional districting may differ from state to state and from district to district."

Professor William M. Beaney, formerly of the political science faculty at Princeton University and now on the University of Denver law faculty, said that "anyone familiar with the realities of the legislative process recognizes that any attempt at precise equality accomplishes nothing that goes significantly beyond the accomplishment of substantial equality—i.e., 5-10 percent deviation from the average." The foregoing comments are reported in Dixon, "The Warren Court Crusade for the Holy Grail of 'One Man-One Vote,'" 1969 *Supreme Court Review* 231-233.

> torted shapes, to require that political subdivision lines be ignored and to demand that numerical equality be the only consideration in drawing district lines is to open the floodgates to gerrymandering, for it means that those who draw the lines have a ready-made, judicially sanctioned excuse for wandering all over the map—literally—as long as they end up with districts of equal population. And this is precisely what has been happening.[36]

Surely these observations put in serious question the wisdom of imposing an absolute population equality rule at what Mr. Justice Fortas has called "this relatively early stage of the reapportionment effort."[37]

E. BASED ON THE RECORD BELOW, ANY REASONABLE STANDARD OF PRESUMPTIVE CONSTITUTIONALITY HAS BEEN MET BY THE CONNECTICUT REAPPORTIONMENT PLAN

1. The Necessity of Articulating a De Minimis Standard in Terms of Presumptive Constitutionality

As applied to the facts of the Connecticut case, the foregoing considerations for not requiring any tighter numerical equality rule than achieved by the State Apportionment Board are all-compelling. Indeed, given the constraints imposed by the size of the available census units, the plan is well below the level of any reasonable "substantial equality" or "de minimis" requirement for determining its constitutionality. There are instances in which higher absolute deviations have been judicially approved in post-1970 reapportionments. (*See,* Section I-C, *supra.*) By "presumptive constitutionality" is meant a level of population deviation so small that the plan may be upheld unless invidious discrimination specifically is shown, *e.g.,* proof of partisan or racial gerrymandering. The phrase "presumptive constitutionality" simply restates in functional terms the "substantial equality" and "de minimis" concepts of *Reynolds* and *Swann.*

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[36] David I. Wells, "The Impact of Gerrymandering," *The American Federationist*, February, 1972, p. 14 at 15.

[37] *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 540 (1969).

No decision of this Court in a state legislative or local government case under the equal protection clause of the Fourteenth Amendment suggests any constitutional infirmity in the Connecticut plan. *See, Kilgarlin* v. *Hill,* 386 U.S. 120 (1967); *Swann* v. *Adams,* 385 U.S. 440 (1967); *Reynolds* v. *Sims,* 377 U.S. 533 (1964). In *Reynolds,* the Court was alert to the danger of gerrymandering flowing from a promiscuous recasting of local district lines in pursuit of population equality with all other considerations abandoned. The opinion warned that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." 377 U.S. 578-79. The opinion also stated that somewhat "more flexibility may . . . be constitutionally permissible with respect to state legislative apportionment than in congressional districting" (377 U.S. at 578) in order to minimize artificiality in district formation.

Despite the impossibility of articulating a simple all-encompassing rule in percentage terms, a *de minimis* concept of population deviation, better labeled a "presumptive constitutionality" rule, is a needed adjunct of the constitutional law of fair representation. It will serve the purpose of defining that point at which a state has presumptively complied with the equal protection of the laws under the Fourteenth Amendment. Unless a challenger can show that the minimal population deviations are above the level of presumptive constitutionality, the plan should be upheld. Definition of such a point is needed to bring order into reapportionment litigation, to regularize it, and to speed the achievement of certainty and finality in reapportionment.[38]

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[38] The difficulties in rejecting any standard of presumptive constitutionality have recently been exposed by the Supreme Court of Iowa. *See, In re Legislative Districting of the General Assembly (Noun* v. *Turner),* 193 N.W.2d 784 (Iowa, 1972); *In re Legislative Districting of the General Assembly (Rasmussen* v. *Ray),* 175 N.W.2d 20 (Iowa, 1972).

In *Noun* v. *Turner,* plaintiffs challenged a reapportionment con-

2. The District Court Based Its Decision on an Erronous Finding of Fact and Never Reached the Presumptive Constitutionality Question

The primary difficulty with the District Court's conceptualization of the *de minimis* rule (Memorandum of Decision, Single Appendix, p. 9a) is that the court never attempted to define and then apply its formulation. Although its assertion was unsupported by any citation to the Record, the District Court first concluded that the population disparities could have been less had political fairness not played a role (*id.* at 7a-8a). Significantly, the court did not first consider what was an appropriate *de minimis* standard for this case. This would seemingly be a prerequisite to determining whether the population deviations

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structed with 1970 decennial census data which resulted in great mathematical precision. In the 50-district Senate, the largest (57,365) and smallest (55,575) deviated from the ideal (56,500) by +1.6% and —1.6%, respectively. Absolute person deviations were 865 and 925, respectively. In the 100-district house, the largest (28,833) and smallest (27,769) districts deviated from the ideal (28,250) by +2.1% and —1.7%, respectively. Absolute person deviations were 583 and 481, respectively. A plan devised by the League of Women's Voters which had slightly lower deviations was noted by the Court not ". . . as an alternative plan but rather its demonstration of applicant's principal thesis; namely, that plans more equal in population can be developed." 193 N.W.2d at 790. Because of this "demonstration", the burden of proof shifted to the advocates of the reapportionment plan to show why their good faith efforts at achieving numerical accuracy were not as minutely successful.

The main criticism of this approach is that the court's attention is no longer focused on the alleged constitutional injury (invidious impact) suffered by the electorate, but rather is directed toward analyzing the permissibility of various *inputs* during the redistricting process. Given such a format, counsel should not have difficulty: (1) devising an alternative plan with slightly lower numerical deviations, thus winning for his client the evidentiary advantage; and (2) finding certain inputs into the redistricting process which can be described as "political" and "without rational basis" which allegedly accounted for increased numerical deviations.

were valid on their face, and in considering whether the deviations were justified even if they were outside the range of presumptive validity. What the court did was to conclude, without proof, that the effect of a particular state policy increased population disparities from an insignificantly lower level. It then condemned this alleged "effect" as a violation of the court's still unarticulated *de minimis* rule. In practical result, the *de minimis* level was defined as perfect population equality, or at least as the level of the numerically tightest plan in the Record. The court then proceeded to reject as a justification for population deviations the already condemned political fairness policy. This circular reasoning process, founded on a factual fallacy, was tantamount to assuming the answer by the manner of stating the question.

In short, Connecticut has adopted a presumptively constitutional plan on any reasonable population test and the plaintiffs have not sustained their burden of proving to the contrary.[39]

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[39] To be sure, they have alleged, almost *ad nauseum*, that the political fairness principle (which was followed by the Board as a partial guide in drawing the many new district lines necessitated by the tight population equality guidelines) operates to increase the population deviations. There is not one iota of evidence in the voluminous Record to support that assertion. And this is so despite the fact that the District Court purported to make such a finding in its opinion.

On this point the Court's attention is invited to the lengthy deposition of Judge Saden, a member of the Apportionment Board (Single Appendix, pp. 20-78) and the deposition of James Collins, who was an assistant to the Board in drafting plans (*id.* at pp. 79-130), and the trial transcript (Single Appendix, pp. 183-267). That a political fairness principle was included in the Board's work is obvious. Indeed, this was one of the virtues of the operation of this bipartisan Board with tiebreaker, as is developed in Section IV-D, *infra*. The interrelation of the political fairness principle and the town line cuts is dealt with in the depositions and trial testimony at great length. It is noteworthy that of the plaintiff-appellees four proposed plans (Pl. Exs. 20-23, Single Ap-

II. THE "POLITICAL FAIRNESS" PRINCIPLE, CONSIDERED BY THE CONNECTICUT REAPPORTIONMENT BOARD AS A NECESSARY COROLLARY TO SUBSTANTIAL POPULATION EQUALITY, IS A RATIONAL STATE POLICY RELATED TO THE ULTIMATE PURPOSE OF REAPPORTIONMENT—FAIR REPRESENTATION; IT DID NOT DISTORT POPULATION EQUALITY, AND THUS FURTHER SUPPORTS THE CONSTITUTIONALITY OF THE STATE PLAN

A. POLITICAL FAIRNESS AS A RATIONAL STATE POLICY IS DEMONSTRABLE EVIDENCE OF GOOD FAITH COMPLIANCE WITH THE REPRESENTATION GOALS OF REAPPORTIONMENT WITHIN A DE MINIMIS LEVEL OF POPULATION DEVIATION

The fact that the Connecticut Apportionment Board achieved a plan with maximum deviations smaller than the average size of the census units being used is demonstrable evidence that the Board made a good faith effort to comply with the "substantial" or "practicable" equality rule of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and the restated "de minimis" rule of *Swann* v. *Adams*, 385 U.S. 440 (1967). No evidence in the lengthy depositions of Board Member George A. Saden and Board Assistant James F. Collins, or in the Trial Transcript (Single Appendix, pp. 20-130) supports any conclusion to the contrary. A link is shown between the political fairness policy and some minor increase in town line cuts but *no adverse link whatsoever* between the political fairness policy and the population deviations in the districts created by the plan.[40]

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pendix, pp. 178-81; 226-30), the only one which has smaller population deviations than the State plan cuts more town lines (58) than the Board's plan (47). Trial Trans., Single App., p. 230. But one would think that plaintiffs were preparing for a state trial, not a federal action. Town line cuts are a state issue, not a federal issue, absent an allegation and proof of invidious discrimination (Section III-D-3(6), *infra*).

[40] The slightly lower population deviations in one of the four plans submitted at trial by appellees were achieved *not* by supposedly abandoning a policy of considering political data but by cutting even more town lines than cut by the Board (Pl. Ex. 23, Single App., p. 230).

The holding in *Swann* v. *Adams, supra,* establishes a presumption of constitutionality for reapportionment plans which have a *de minimis* numerical population deviation; deviations above a *de minimis* level may be permissible if justified by a rational state policy which is itself reasonably related to the democratic representation purposes of the reapportionment process. Because the deviations in *Swann* were substantial, this Court was not compelled to develop comprehensive guidelines for applying a *de minimis* standard. The primary concern was to allow for some margin of understandable deviation within which parties challenging reapportionment plans must sustain the burden of proving discriminatory impact. Although the opinion of Mr. Justice White spoke in terms of "unavoidable error", we do not believe that the presumption of constitutionality may be overcome merely by plaintiffs submitting an alternative plan with slightly lower deviations. Such an approach would make any presumption of constitutionality illusory.[41]

Part I of the Brief demonstrates that Connecticut has actually achieved deviations *below* a *de minimis* level, even if that term is now to be defined in stringent numerical equality terms. Therefore, the rational state policy of striving for political fairness is relevant in the context of this case as *corollary* evidence of the good faith of the Board and the soundness of the State plan, rather than as needed justification of conscious population deviations.

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[41] That the presumption of constitutionality is not a mere formality which may be callously disregarded was made evident in the dissent in *Swann* (Harlan, J., joined by Stewart, J.): "This holding seems to me to stand on its head the usual rule governing this Court's approach to the validity of legislative enactments, state as well as federal, which is, of course, that they come to us with a strong presumption of regularity and constitutionality. [Citations omitted.] Accordingly, I do not believe the burden is on the State to justify every aspect of a complex plan completely restructuring its legislature, on pain of its being declared constitutionally invalid by the judiciary." 385 U.S. at 447-48.

Tight population equality was sought as a preeminent goal. But that goal was not viewed in the light of *Reynolds* and *Swann*, or other Fourteenth Amendment cases as a mathematical absolute requiring a total disregard of town line cuts and a juggling of census units until absolute ground zero, in census unit terms, is reached.[42] *See, e.g., Hadley* v. *Junior College District*, 397 U.S. 50 (1970); *Abate* v. *Mundt*, 403 U.S. 102 (1971).

B. POLITICAL FAIRNESS IS A RATIONAL STATE POLICY JUSTIFYING THE ACTUAL DEVIATIONS IN THE CONNECTICUT STATE APPORTIONMENT EVEN IF SUCH DEVIATIONS ARE DEEMED TO EXCEED A DE MINIMIS LEVEL OF PRESUMPTIVE CONSTITUTIONALITY

Even if this Court feels the time has not yet come to clarify the guidelines which are needed in order to reinforce the presumption of constitutionality for reapportionment plans, the miniscule deviations reflected in the Connecticut State Plan are justified under the "rational state policy" approach announced in *Swann:*

> *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house

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[42] Absolute equality in a numerical sense is not possible, because of limitations imposed by the varied size of census units, and the recognized margins of error in canvassing procedures. Theoretically a computer could be instructed to preserve contiguity, ignore compactness and any other consideration, and then group and regroup census units into the designated number of districts until a single "most equal" plan were reached—in terms of the census units then being used. Conceivably no such one plan would eventuate; most certainly many plans would eventuate in which the absolute deviations, in terms of number of persons, would vary by under 100 persons. It would fly in the face of common sense, given the census margins of error and the fact that representation quality is not a function of deviations this small, to designate the preferred plan as the one which represents the last census unit shuffle a computer can make. As soon as any other factor than census units, contiguity, and population equality enters in, the number of alternative plans which quite reasonably satisfy the mixed criteria rises dramatically.

> districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy. 385 U.S. at 444.

The real thrust of *Swann*, responsive like *Reynolds* to the complexities of the field, is the awareness of the interrelation between the form (reapportionment) and the function (representation). Reapportioners are advised to strive mightily for "equality" in population terms, and to be able to articulate with some clarity the corollary non-population elements which entered into the plan and are relevant in judging its validity as a non-discriminatory exercise of state power under the equal protection clause. Because reapportionment is a *representation*-directed process, those who draw lines may legitimately consider some elements other than bare population. Indeed they *must*, because a bare population approach will produce multiple sets of equal population districts and provide no rational basis for the final choice.

The process of reapportionment, therefore, may be viewed as encompassing two separate, yet interrelated, sets of considerations. One set is population equality, the focus for most judicial pronouncements during the past decade. The other set of considerations, of which courts have taken notice but have not clothed with precise meaning, may be identified under a general rubric—the "representative factor". The following issues relating to reapportionment have been presented before the courts as appropriate subjects for judicial inquiry: a policy against cutting local political unit lines, compactness and contiguity, avoidance of racial-political gerrymandering, preservation of local communities of interest, stability and continuity in districting, avoidance of artificiality in devising the lines of "equal" districts, and others. *See, e.g., Reynolds* v. *Sims*, 377 U.S. at 578-81; *Kirkpatrick* v. *Preisler*, 394 U.S. at 530. Although the "representative factor" has been articulated in an imprecise and often overlapping fashion, it is as vital

as population equality to the achievement of over-all equity in reapportionment.

Not all of the listed considerations are consistent among themselves, or compatible with a fundamental policy of substantial equality of population in districting. Functionally viewed, however, they point in the same direction. All are aimed at achieving the common goal of *political fairness* in the actual operation of reapportionment plans. Legislative representation and political power are at stake, and it is instinctively and properly realized that numerical equality alone guarantees neither avoidance of gerrymandering, stating the problem negatively, nor attainment of "effective representation" in *Reynolds* v. *Simms* terms. 377 U.S. at 578-79.

Each one of the fragmented considerations if pursued with single-minded intensity is inconsistent with the major premise of substantial population equality. For example, the inconsistency of an anti-town-line-cut policy and population equality is recognized by all parties to this Connecticut litigation. (See discussion, *infra,* Section III-D-3-b.) The problem of harmonization of population equality and any one of the listed considerations is rendered difficult by the indefinite contours of presumptive constitutionality keyed to *de minimis deviations* per se. It is also rendered difficult by the uncertain parameters of the "justifications" principle whereby plans not per se "equal" enough may achieve constitutionality if related to the purposes of corollary rational state policies concerning fair representation.

To all of the foregoing statements of difficulties in intermingling a population equality policy with any other policy related to the ultimate goal of fair and effective representation there is one outstanding exception, namely, a policy of *directly* pursuing political fairness as a corollary goal of population equality. All of the separate policies listed are really indirect or secondary safeguards against political gerrymandering. They are concerned with avoidance

of political imbalance; or in the affirmative, with paving the way for political fairness. Therefore a policy overtly stated as a political fairness policy is a surrogate for all of the listed policies, and more. It is a *direct* and *primary* medium to guard against partisan political gerrymandering—the goal which all of the other policies approach indirectly. More significantly, a political fairness principle, uniquely among all representation-related considerations just mentioned, is *fully compatible* with an equal population equality principle. Only political fairness, directly pursued rather than murkily pursued through such vagaries as "anti-town-line-cut" policies or "community of interest" policies, enables a harmonization of the "form" of equal population districting and the "substance" of maximizing effective representation for the largest possible number of voters.[43]

C. IN CONNECTICUT THE POLITICAL FAIRNESS PRINCIPLE WAS UTILIZED BY THE APPORTIONMENT BOARD AS A COROLLARY PRINCIPLE WITH POPULATION EQUALITY IN ACHIEVING A PRESUMPTIVELY CONSTITUTIONAL AND NON-DISCRIMINATORY REAPPORTIONMENT PLAN

1. The Anti-Gerrymandering Purpose of the Reapportionment Process Specified in the Connecticut Constitution

One of the primary reasons for authorizing reapportionment by a bipartisan board with tie breaker is to avoid discriminatory reapportionment by one party against another. This type of discrimination can be averted or at least minimized at the outset by using the bipartisan method of reapportionment. It is extremely difficult to check after-the-fact, given the problems of justiciability, proof, and standards of judgment of invidiousness.[44] Another reason for authorizing reapportionment by bipartisan board is to bring out into the open the "dirty little secret," which all know but like to deny, especially in litigation, that reappor-

[43] The stated goal is analogous to the Benthamite "greatest good of the greatest number" principle.

[44] See, *e.g.*, *Sincock* v. *Gately*, 262 F.Supp. 739 (D.Del. 1967).

tionment is a political process throughout, and that every line drawn has a political character. Political knowledge informs most of the reapportionment efforts coast-to-coast, as evidenced by journalist comment on the operation and product of all kinds of reapportionment agencies. Even if reapportionment is done on a chance basis by a nominally blind reapportionment process, this amounts to playing "Russian roulette" with the question of political or racial discrimination in line-drawing.

The Connecticut Apportionment Board came into operation under the state constitution, which regulates the entire process of reapportionment (Art. III, § 5, Juris. Statement, p. 16a), only after two political failures to reapportion had already occurred: failure to achieve the required two-thirds vote in both houses; and failure of an even-numbered bipartisan commission set up by the legislative leaders of each party to reach agreement. There is no gubernatorial veto over reapportionment in Connecticut. Had agreement been reached in either of these two initial processes, the present suit most likely would not be in this Court now. And yet in any such agreement the use of past election data would have been a normal part of the reapportionment process, just as in the politically-informed reapportionment processes in other states,[45] and just as in the Apportionment Board operation.

Given this background on prior reapportionment attempts in Connecticut and the political realities of reapportionment in all states, the Apportionment Board would have been derelict in its duty had it either (a) operated in politically knowledgeable and politically *partisan* fashion, or (b) politically *blind* fashion playing Russian roulette with the real danger of discriminatory districting. As Justice White has said in the *Kirkpatrick* and *Wells* cases:

> "In reality, of course, districting is itself a gerrymandering in the sense that it represents a complex blend

[45] The National Legislative Conference and the Council of State Governments, *Reapportionment in the States* 28-31 (1972).

> of political, economic, regional, and historical considerations. If county and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, one differing very little from another, but each having its own very different political ramifications." 394 U.S. at 554-55.

This thought was echoed in the opinion of Justice Harlan, joined by Justice Stewart, in the same proceeding:[46]

> "A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature must do more than satisfy one man-one vote: it must create a structure which will in fact as well as theory be responsive to the sentiments of the community." 394 U.S. at 551.

The Apportionment Board took the middle course, the more difficult and more responsible course, of seeking to avoid the creation of a discriminatory districting plan for the house or senate, by considering both population equality and political realities. It did so in a spirit of harmonization of the population and political elements which together determine the ultimate goal of "fair and effective representation." *Reynolds* v. *Sims*, 377 U.S. at 565-66. This policy choice necessarily required consideration of political realities and representation interests transcending bare numbers just as in the operation of the Boundary Commission in Great Britain, where local hearings are held over a period of years (four years for the 1969 Redistricting Plan) and final scrutiny and comments by all polit-

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[46] These congressional redistricting cases are not relevant on the question of determining a "practicable" level of population constitutionally required under the Fourteenth Amendment for state redistricting (see Section I-D, *supra*, and *Abate* v. *Mundt*, 403 U.S. 102 (1971)), but are relevant as highlighting the shared dangers, in congressional redistricting and state-local redistricting, of political invidiousness and of thwarting of the substantive goal of effective representation.

ical parties is part of the regular process of parliamentary redistricting.[47]

This policy choice flows indeed from a natural reading of Art. III, § 6, of the Connecticut Constitution itself setting up the safeguarded three-step process culminating in the bipartisan-tiebreaker apportionment board.

The rational policy choice of political fairness constitutionally prescribed in Connecticut has several facets. The *first* element is to leave the apportionment function in the hands of the legislature, while safeguarding against an easy power grab by the dominant party by requiring an extraordinary majority (⅔) to enact the plan.[48] The *second* element is not to transfer reapportionment to some chance process after legislative failure, but to transfer it to the eight-man bipartisan legislative commission. It is safeguarded both by its bipartisan composition and by a three-fourths majority requirement against the dangers of single-party control, a partial sell-out by one party, or politically unfair districts even if absolute population is sought.

In the event of commission failure, the *third* element of the rational state policy is to transfer reapportionment to yet another politically-safeguarded agency. The legislative leaders of each party choose one judge of the state Superior Court to sit on the Apportionment Board, and these

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[47] After completion of the tentative reapportionment, the Boundary Commission accepted the suggestion of the leaderships of the political parties represented in the House of Commons and met with these leaderships to discuss with them the proposed action. Thereafter, during the ironing out process, there were at least seven further such meetings between the Boundary Commission and the party leaders. Boundary Commission for England, *Second Periodical Report* 3 (1969).

[48] This is a more reliable safeguard than relying on the governor's veto power, because the governor is frequently of the same party as the dominant party in the legislature.

two select a third elector—thus carrying the spirit of political fairness into the tiebreaker selection process itself. The two party-selected board members could agree on a third, or one could prepare a list of acceptable names from which the other could make a selection—the actual process used in this instance with the Democratic-appointed board member preparing the list and the Republican-appointed board member making a selection.[49]

This carefully devised system of reapportionment for Connecticut, adopted in 1965 as a reasoned response to the *Baker* and *Reynolds* rulings, demonstrates that the voters who embedded the system in the state constitution were keenly aware of the fundamentally political nature of reapportionment both in process and in result—a fact not at all changed by adding the federal requirement of equal population. The Connecticut system chooses not to ignore but to recognize and regulate the political element.

2. The Policies of the Apportionment Board

Apportionment Board Member George A. Saden articulated at several points in the record the Board's primary concern for population equality as a federally required and fundamental goal, and its corollary use of the rational state policy of political fairness as a guide in determining where to draw district lines, given the many "equal line" possibilities and the need to preserve the anti-gerrymandering spirit of the state's town line policy.[50] The over-all guiding

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[49] Q. (Satter): And how was Thim appointed as the third member of the board? A. (Saden): I received a letter from Mr. Parskey with a list of six names of six judges and Mr. Thim's name was on the list. Mr. Parskey indicated in his letttr that anyone of the six were satisfactory to him so I selected Mr. Thim on that basis and we agreed on Thim. Saden Deposition, Single App., pp. 21-22.

[50] A vast majority of the town lines were preserved (see Section III-D-3-b). However, once the state prohibition on cutting town lines was overridden by the federal equal population concept,

principles utilized by the Apportionment Board were articulated by Judge George A. Saden as (1) the equal population or "one man-one vote principle" of *Reynolds* v. *Sims, supra;* (2) an attempt to minimize town line cuts and segmentation insofar as possible; and (3) "as a corollary of the one man-one vote principle a plan that would be fair", i.e., one that would interrelate "as closely as possible" the composition of each house and the "actual plurality of vote on the House or Senate lines in a given election." [51]

The meaning of these Board policies was further amplified in the following colloquies at trial between plaintiffs' attorney, Mr. Satter, and Judge Saden:

> "Q. (Satter): What do you mean by fairness in this case?
> "A. (Saden): Fairness is a plan that will meet the one man, one vote test and will reflect the vote on the Senate and House lines in the elections in this relatively same percentage proportion, both in control of those Houses as they reflect the plurality of the vote on the total Senate and House lines in the State and not the great disparities that you have under the reapportionment plan for which incidentally Mr. Parskey was largely responsible back in 1964 when—" [52]
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> * * *
>
> "Q. (Satter): And those were the two factors that you had in mind, a low percentage deviation and an over-all fair plan. Were those the dominant factors in your mind?
> "A. (Saden): Plus the fact that keeping in the House, at least trying to as far as we could to maintain town integrity on lines, although I realized in

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nothing remained of that policy that could give explicit guidance to the Board on specific town cuts, other than the prohibition clause's own underlying political fairness spirit.

[51] Trial Trans., Single App., p. 264, quoted in full at fn. 20, *supra.*

[52] Saden Dep., Single App., p. 38.

the House we weren't going to be able to do as well as we could in the Senate." [53]

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"A. (Saden: . . . and secondly, I think that you cannot look at these plans piecemeal without taking into consideration as a third factor the over-all politi cal composition of a plan. The present reapportionment plan, or the one in existence prior to this one, is completely lopsided for that very reason, when you get the kind of representation in both Houses that you have had in '66 and '68 and '70 which are way out of whack compared to the actual plurality of vote in favor of the party in control in those three elections; this is a factor toward the development of a fair plan. It is a corollary to the idea of the one man, one vote theory. The effectiveness of any man's vote who votes for the minority in an election is diminished if he is being swamped in representation in the House or the Senate because of some arrangements of districts that don't give him a voice or the proportionately equal voice that he should have. It's conceivable, for example, that you could have—take an extreme situation where every district in the State is won by one vote by one party or the other, and in that event there would be no representation for the very substantial minority number of electors who voted in that election. You would have a complete sweep of representation. Now that to me is effectively defeating the one man, one voice theory, is a largely disproportionate population arrangement." [54]

Apportionment Board Assistant James F. Collins explained his conception of the Board's policies in this colloquy with plaintiff-intervenors' attorney, Mr. Beizer:

Q. (Beizer): Specifically were you given any instructions by Judge Saden after the time that he was appointed as one of the members of the panel?

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[53] *Id.* at 36.

[54] *Id.* at 45.

A. (Collins): I think I already testified that his instructions were he wanted a plan that was mathematically as exact as we could get it, number one; and he wanted a plan that would be a fair plan in the sense that either party, whichever party carried the State should carry that particular branch.[55]

In none of these articulations of Appointment Board policy is there any derogation of the population equality principle. This principle was taken as a given. Indeed, as demonstrated in Section I, *supra*, it was interpreted and implemented in such a stringent equal population spirit that Connecticut is one of the few states to achieve deviations below the census unit average. There has been a natural feeling of uncertainty among reapportioners as to whether the congressional districting cases, *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), have some applications to state and local reapportionment too,[56] and therefore a strong tendency to err on the low side regarding numerical equality.[57]

Interpreted on the low side the population equality principle necessarily overrode the Connecticut constitutional

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[55] Collins Dep., Single App., pp. 115-16.

[56] *See Connor* v. *Williams*, 404 U.S. 549 (1972), in which this Court, per curiam, indicated that *Kirkpatrick* and *Wells*, as congressional redistricting cases, have separate constitutional foundation, and that their application in whole or in part to state legislative reapportionment has not yet been determined.

[57] This aura of caution, exemplified by the straining of reapportioners and lower courts for deviations so tiny as to be anomalous under foreign precedents, actually presses census data beyond the bound of reliability. *See e.g., In re Legislative Districting of General Assembly*, 193 N.W.2d 784 (Iowa 1972). But such precautionary activity is not a substitute for an open and reasoned articulation of considerations relevant to a Fourteenth Amendment rule as a prelude to authoritative pronouncement by this Court.

prohibition against cutting any town lines,[58] thus creating a further problem for the Board. The problem was how to preserve *something* of the anti-town-line-cut policy while at the same time achieving the still uncertain level of equality mandated by the *Reynolds-Swann* "de minimis" principles. Only by cutting still further town lines could a deviation lower than the actual 789-person deviation be achieved. Appellees have at one point (Complaint, Single App. pp. 8-9) criticized the Board for dishonoring the Supremacy Clause by cutting more deeply than federally required into the state anti-town-line-cut policy. However, this argument is more than slightly disingenuous because appellees have also criticized the Board for not going far enough and reducing population deviations still further. And yet the only one of the appellees' four places which deviates from ideal by slightly fewer persons than in the Board plan cuts more town lines than cut by the Board. (Pl. Ex. 23, Single App., p. 230).

3. The Political Fairness Principle Is Responsive to the Unavoidable Policy Choices Confronting Reapportionment Agencies, and Harmonizes Fully with Population Equality

A reapportioning agency cannot have it both ways. It cannot maximize population equality and also maximize preservation of local boundaries. The two are intrinsically incompatible. It can seek to maximize the highest combination of values possible: *population equality* in order to prevent underrepresentation in the legislature of residents of a series of overly large districts; and *political fairness* in order to avoid the imbalanced accumulation of submerged voting minorities in a series of districts, *i.e.,* voters with a numerically equal vote in population terms which is worth zero in terms of political effectiveness. As Chief Justice Warren said: "legislators represent people, not trees or acres." *Reynolds* v. *Sims,* 377 U.S. at 562. And because

[58] Connecticut Constitution, Art. III, § 4.

people are not fungible, but have widely different interests in political expression, the function of legislative district construction necessarily must take into account this non-fungibility to avert the danger of creating *formally* equal districts which *substantively* discriminate against some identifiable and meaningful political representation interests.

The solution achieved by the Connecticut Apportionment Board of combining population equality and political fairness is to be praised, not criticized. These two values, unlike population equality and preserving town lines, are intrinsically compatible, and indeed reinforce one another.

In the context of this case, political fairness is a *state* policy because adopted by the Apportionment Board under its constitutionally-authorized function of reapportioning the state through a *bipartisan* mechanism. Political fairness is a *rational* policy because it provides a means reasonably adapted to safeguarding against the perennial danger in reapportionment of invidious partisan discrimination (gerrymandering). It is indeed a rational policy for all states because it relates directly (and not merely indirectly as does population equality) to the ultimate purpose of reapportionment, *i.e.*, provision of a basis for effective legislative representation. In the United States as in England effective political representation in legislatures is achieved, to all intents and purposes, through the political party system. Parties provide the candidates, and the channels for input into the legislature, whether or not the electoral supporters of a party are formally registered with it or not.[59]

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[59] It follows from this point that the Board quite properly did not focus on registered membership in one party or another as a basis for testing out alternative sets of district lines, which *would* have produced a distortion of the "one man-one vote" concept. It focussed on the actual representation interests of all voters in the state by considering total electoral performance as a check on invidious districting.

Specific recognition of the importance of the political party element in the composition of governmental bodies is found in local government cases supporting the constitutionality of minority representation devices—even to the point of creating limited voting systems. This Court has recently affirmed a ruling holding constitutional the Connecticut Minority Representation statute, which provides for such party representation.[60]

Nor can it be said that the invocation of a political fairness consideration operates to pre-judge an election.[61]

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[60] In *LoFrisco* v. *Schaffer*, 341 F.Supp. 743 (D.Conn. 1972), *aff'd*, 41 U.S.L.W. 3245 (November 6, 1972), the district court held that the state had a legitimate interest in providing local boards with a "significant minority voice, to air and introduce ideas which the majority might not otherwise consider." *Id.* at 750. It was recognized that the statute was grounded implicitly on the assumption that representation is best effected through the major political parties. "The assumption that the only way in which to obtain diverse views is to classify by political party and the view that the party groups are somewhat monolithic, may not be necessarily correct, but this is a permissible and even approximately true perception." *Id.* The effect of the limited voting statute was to guaranty a fixed proportional representation, the minority party securing one-third of the board seats regardless of their percentage in the election. Although a flexible ratio or true proportional representation format might have provided greater mathematical accuracy, the court held that a greater degree of flexibility was permissible in local elections citing *Abate* v. *Mundt*, 403 U.S. 187) so long as supported by a legitimate state interest. In the context of Connecticut legislative reapportionment, the strength of *LoFrisco* is the judicial recognition of fair political representation as a rational state policy which may be actively pursued by devices which reflect political party structure. Any distinction which may be made between local and state elections would not limit the applicability of political fairness as a legitimate state interest, although it may arguably have a bearing on the degree of permissible mathematical deviations.

[61] See discussion of safe districts in Section III-D-3-c, *infra*.

There is an intrinsically volatile quality to the "one man" who casts the "one vote" which we seek to make as effective as possible in representation terms. Voting is not so volatile, however, that we can learn nothing from past political behavior data; broad voting patterns of particular areas tend to be relatively stable. By recognizing such data the Apportionment Board could construct a representation plan which would be a *better* vehicle through which electoral choice may be fairly and non-invidiously channelized than if blind chance were followed.

There is a sharp distinction between good faith avoidance of known obstacles to fair expression of political opinion, and designing districts to slant the next election in favor of one element whether or not it has popular support. The former approach operates to "free-up" the political process by creating districts intrinsically fair to all contestants; the latter approach perpetuates or creates unfair patterns of representation. Responsive to the constitutionally protected interest in free expression an apportionment agency has a duty to avoid district lines which submerge fair expression of political opinion. Population equality tells reapportioners that districts must be equal but many sets of "equal" districts are possible, all with different political effects. The role of a fairness or balance principle, operating as a surrogate for virtually all other suggested reapportionment factors, is to help ascertain where the many possible lines of these "equal" districts may be drawn without slanting the next election unfairly. Political fairness directly reconstitutes, for example, the check on gerrymandering which was one indirectly achieved purpose of Connecticut's prohibition on cutting town lines. Political fairness is also fully compatible with any degree of equal population stringency. It is the *one* state policy which can effectively survive the reapportionment revolution.

If population equality is achieved, the question whether political fairness also has been achieved is a matter for challenge and proof by appellees. The mere fact that knowledge of past voting patterns has been recognized in the construction of the districts conflicts with no federal constitutional principle of reapportionment, absent proof of invidiousness. A federal constitutional policy of invalidating all plans grounded in knowledge of political data would automatically void almost all districting plans now in force under the 1970 census—82 percent of them prepared by the legislators themselves, and 18 percent prepared by partisan ex officio boards, bipartisan boards, or analogous politically-knowledgable agencies.[62]

There cannot reasonably be any federal rule of per se invalidity of reapportionments that rest on awareness of political data, especially if that data is used in a good faith attempt to effectuate a rational state policy of reapportioning on a nondiscriminatory basis as well as an equal basis.

It is the political fairness or balanced aspect of the Connecticut plan, and not merely its strong population equality aspect, that "justifies" the lines being located where they are. Under a mere population equality rule the lines could be located in any number of other places. The political fairness principle reduces the options to an intelligible basis; and that basis goes to the fundamental purpose of reapportionment itself—fair and effective representation in the legislative process achieved by legislative districts which receive and channel the popular will.

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[62] The National Legislative Conference and The Council of State Governments, *Reapportionment in the States* 14-15 (1972).

III. THE CONNECTICUT "EQUAL POPULATION" APPORTIONMENT PLAN INCORPORATING ALSO THE RATIONAL POLICY OF POLITICAL FAIRNESS IS IN NO SENSE A POLITICAL GERRYMANDER EVEN IF ALLEGATIONS OF POLITICAL GERRYMANDERING ARE JUSTICIABLE. NOR IS IT INVIDIOUSLY DISCRIMINATORY UNDER ANY SUBSTANTIVE (NON-NUMERICAL) CRITERIA OF DISCRIMINATORY DISTRICTING; IN ANY EVENT PLAINTIFF-APPELLEES HAVE NOT SUSTAINED THE BURDEN OF PROVING INVIDIOUS DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT

A. THE DISTRICT COURT RULING IN RELATION TO ALLEGED SUBSTANTIVE (NON-NUMERICAL) INVIDIOUSNESS IN THE CONNECTICUT PLAN

The District Court expressed doubt about the justiciability of political gerrymandering per se, but purported to rest its decision on something else. That something else may have been numerical equality per se, *i.e.*, deviations too large and not justified. (Mem. of Dec., Juris. Statement, p. 8a). Alternatively, the ground for decision may have been numerical equality in relation to the political fairness or political balance principle (*id.*, at 10a-11a).

This latter ground in turn seems to rest ambiguously either on the assertion that (1) the use of political fairness considerations increased deviations, although the Record has no factual support for the assertion; or (2) that the use of political fairness considerations, wholly apart from any numerical aspect, may have operated to create districts *substantively* defective in fair representation terms. Specifically the court mentioned "safe" districts. Because the second alternative ground for decision raises a question of non-numerical invidiousness it falls under the rubric of a "gerrymandering" holding, broadly defined. Hence this Part III of the Brief demonstrating that the Connecticut Plan is likewise non-invidious in its non-population aspects is deemed necessary. (See also Mot. to Affirm, pp. 10 and 35, and note the attempted use of political gerrymandering allegations on a purely descriptive basis at pages 13-35, discussed *infra* in Part III-D of this Brief.)

B. THRESHOLD ISSUE OF JUSTICABILITY

At the threshold there is a problem of justiciability regarding the generalized allegations of plaintiff-appellees that apart from any numerical equality issue the Connecticut Apportionment Plan is an invidious discrimination in political terms. Although mentioned in the Complaint (Paragraph 15, Single Appendix, p. 11) little attempt was made at trial to support the allegations, except by indirection by introducing some maps into the Record.

Since *Baker* v. *Carr*, 369 U.S. 186 (1962), it has been clear that allegations of population inequality among legislative districts are justiciable. As this line of litigation has developed, the critical issue which has emerged is ascertaining the point at which population deviations from ideal district size are so insubstantial or *de minimis*, particularly if interrelated with rational state policies serving additional representation values, that no invidious discrimination results under the Fourteenth Amendment. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Swann* v. *Adams*, 385 U.S. 440 (1967). This Court has had little occasion since 1967 to speak to that question and clarify the meaning of the Fourteenth Amendment in this regard, except in *Hadley* v. *Junior College District*, 397 U.S. 50 (1970) and *Abate* v. *Mundt*, 403 U.S. 102 (1971). In both of these cases an approach was taken consistent with a de minimis concept. Points I and II of the Brief, *supra*, have developed this issue.

Quite different is the question of justiciability regarding the operating effect of legislative districts viewed from a political standpoint, albeit that may be the only aspect of districting ultimately concerning anyone. From the judicial perspective there are critical problems of proof and standards which can be related to specific and administrable constitutional principles.

Pleas of racial unfairness, *i.e.*, political gerrymandering focusing primarily on racial rather than partisan considerations, are concededly justiciable. But the plaintiffs

must show intentional discriminatory purpose and effect, and the absence of alternative non-racial explanations for the district lines. *Whitcomb* v. *Chavis*, 403 U.S. 124, 144, 149 (1971); *Wright* v. *Rockefeller*, 376 U.S. 52 (1964); and *Mann* v. *Davis*, 245 F.Supp. 241 (E.D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis*, 382 U.S. 42 (1965). The justiciability of political gerrymandering focusing on partisan rather than racial considerations (albeit the two may not be easily separable in the North, as the *Whitcomb* opinion indicates) has been a matter of dispute. *WMCA* v. *Lomenzo*, 382 U.S. 4 (1965); *Badgley* v. *Hare*, 385 U.S. 114 (1966); and *see* excellent analysis by Judge Wright in *Sincock* v. *Gately*, 262 F.Supp. 739, 857 (D.Del. 1967). Arguably the conceded justiciability of pleas of political or racial unfairness in multimember district context, which may be simply a special form of gerrymandering, should carry over into single-member districting. *Burns* v. *Richardson*, 384 U.S. 73 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965). We do not now contest the justiciability of allegations of partisan gerrymandering, whether made in single-member or multimember district context, provided, however, political-partisan gerrymandering, like political-racial gerrymandering, must be proven by the party alleging such invidious discrimination.

C. THE BURDEN OF PROOF IS ON THE CHALLENGERS REGARDING ALLEGED POLITICALLY INVIDIOUS DISCRIMINATION IN A PLAN WHICH SATISFIES NUMERICAL EQUALITY, AND WHICH IS FURTHER SUPPORTED BY A POLITICAL FAIRNESS PRINCIPLE.

In the era of *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the burden of justifying significant population deviations was allocated to the state. However, once the equal population rule became established and was followed in new reapportionments, the burden of proving substantive representation unfairness in substantially equal districts was allocated to the challenger.

The latter approach is exemplified by such cases as *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), *Burns* v. *Richardson*, 384 U.S. 73 (1966), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). In the *Burns* case Mr. Justice Brennan said that because population equality was not at issue the lower court was wrong in insisting that the legislature "justify" its proposal. He went on to say that the legislature's reapportionment judgments, assuming a proper population basis, "were subject to constitutional challenge only upon a demonstration that the . . . [apportionment plan] . . . was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 384 U.S. at 89.

This approach was strengthened and reiterated in 1971 in *Whitcomb* v. *Chavis* and clearly indicated that if a plan is permissible on equal population grounds, any other species of invidious discrimination must be supported with convincing proof, and not merely alleged. The Court said: "[W]e have insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." 403 U.S. at 144. And the Court concluded: "Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less *opportunity* than did other Marion County residents *to participate in the political processes and to elect* legislators of their choice." 403 U.S. at 149 (emphasis added). In short, on the nonpopulation aspect of the case the Court wanted proof of "real-life impact . . . on individual voting power," and the burden was on the challenger to make such proof. 403 U.S. at 146. And the burden is heavy, Mr. Justice White remarking that: "We have not yet sustained such an attack." 403 U.S. at 144.

D. THE POLITICAL FAIRNESS PRINCIPLE USED CONJOINTLY WITH POPULATION EQUALITY BY THE APPORTIONMENT BOARD IS NOT IN ITS OWN RIGHT A "POLITICAL GERRYMANDER" AS APPELLEES ALLEGE; NOR WAS IT PRODUCTIVE OF ANY PROVEN OR UNPROVEN DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT

1. The Confusion Caused by Appellees' Attempt to Skirt the Problem of Justiciability and Proof of Political Gerrymandering by Failing to Separate in Their Argument (1) Political Fairness as a Rational State Policy Supportive of the Population Deviations in the Plan; and (2) Political Fairness as a Decisional Element in Line Drawing Which Allegedly Produced "Discriminations" Unrelated to the Question of District Population Deviations.

The political fairness principle enters this litigation in two quite distinct ways.

First, if the population deviations achieved by the Apportionment Board, standing alone, are not presumptively constitutional, they become presumptively constitutional when placed in the context of the corollary rational policy of political fairness embodied in the plan. Parts I and II of this Brief deal with the population deviation question, and the relation to it of the political fairness principle.

There is no evidence at all that the political fairness principle increased the small deviations that do exist. We have also demonstrated in Parts I and II that a political fairness spirit should guide the drawing of a population-based plan, especially a tight equal population plan. A political fairness spirit is needed as a check on the many districting options (some very unfair politically) which arise as a necessary adjunct of the districting freedom associated with a stringent equality rule—*e.g.*, freedom from a state anti-town-line-cut policy. In Connecticut the town line policy cannot even be closely achieved and at the same time achieve substantially equal districts.

Second, if the population deviations *are* presumptively constitutional the question remains whether the plan in operation, as influenced by the political fairness principle or any other drafting guide it embodies, causes invidious

discrimination against some identifiable body of voters. This is a question going to political effect, unrelated to population equality per se. Hence a question of justiciability arises, and in any event challengers have a heavy burden of specific proof (see discussion in Part III, Sections B and C, *supra*).

On this branch of the case it is not enough simply to point out in laundry list fashion, over a sequence of 22 pages, that a number of town boundaries were cut, including a few to improve political fairness, that some district shapes are asymmetrical or noncompact, and that there are safe districts (Appellees' Mot. to Affirm, pp. 13-35). No matter what may be the causes of such cuts, shapes, and safe districts, this is merely description. Indeed, the described elements are found in reapportionment plans in all states. Conceivably these elements in some situations may be possible indicia of unfair play, *i.e.*, political gerrymendering, but they are meaningless unless supported by actual proof of unfair play. Such proof is extraordinarily difficult in a situation where a policy of political fairness has played such a large role. It is devilishly difficult to make a case for unfairness out of a policy of fairness.

What appellees must show on this branch of the case, and have not even purported to show, is "real-life impact . . . on individual voting power." *Whitcomb* v. *Chavis*, 403 U.S. at 146. Instead what appellees have done (*e.g.*, Mot. to Affirm, pp. 13-35) is to smuggle in various facets of a possible political gerrymandering claim under the masquerade of extending their discussion of population equality. Population equality and the relation to it of the Apportionment Board's political fairness principle is one distinct issue.

A wholly separate issue is the question of various non-population-equality impacts of the political fairness policy and whether these impacts cause an individious discrimination *against the particular voters who are plaintiffs-appellants here.* Any voter in an allegedly overpopulated dis-

trict *can* sue to challenge population inequality in districts, *Baker, supra,* but claims of particularized discrimination in districting can be made only by the voters specially affected. *Wright* v. *Rockefeller,* 376 U.S. 52 (1964).[63] We do not find in this Record even the beginning of such particularized discrimination proof as was attempted, albeit unsuccessfully, in *Wright, supra,* and *Whitcomb* v. *Chavis, supra.*

2. The Political Fairness Principle Was Used by the Apportionment Board as One Possible Defense Against a Repetition of the Connecticut Minority Election of 1970 Which Was a Gerrymander in Result Whether Or Not Planned.

Honoring the population equality principle in legislative districting, when that principle is employed without regard to any of the political realities of a state, gives no assurance that the goal of majority rule will result. There have been instances of election of minority legislatures, *i.e.,* a majority of the seats elected by a minority of the statewide legislative vote, under equal population reapportionment plans. When this happens "one man-one vote" has a hollow ring. Use of a political fairness or balance principle by reapportioners, as in Connecticut, is one means of trying to avert such a disappointing consequence of the reapportionment movement. The balance principle does not guarantee against such an eventuality because politics is volatile; it does make use of available data to devise districts which will avoid the worst possibilities of such unfairness.

Examples of minority government include Connecticut in 1970 when the Republicans polled a majority of the statewide legislative vote for the lower house, and arguably for both houses but the Democrats captured a majority of the

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[63] *See also* Note, "Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Problems Plus a Problem of Proof," 72 *Yale L. J.* 1041 (1963).

seats in each house;[64] California in 1966 when the Democratic party captured both houses of the legislature with a minority of the statewide legislative vote; New Jersey in 1966 when there was a similar occurrence regarding the state's congressional delegation.

3. The Minor and, on This Record, Essentially State Law Issues, of: District Shape, Town Line Cuts, Safe Districts, Incumbency

Either the appellees at trial, or the District Court in its Memorandum of Decision, looked askance at the following allegedly descriptive features of the Board plan, as possible grounds for contesting its constitutionality; (a) district shape, (b) excessive town line cuts, (c) safe districts, (d) incumbency. Safe districts and incumbency were specifically mentioned by the District Court, (Mem. of Dec., Juris. Statement, p. 7a), but neither of these were related to the population deviations in the Board plan, and there were no specific findings of discrimination against particular voters.

Any one of these issues could conceivably give rise to a state law issue, although as the District Court noted neither the Federal nor Connecticut Constitutions require legislative districts to be compact (Mem. of Dec., Juris. State-

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[64] In Connecticut in 1970 the Democrats captured a two-seat margin in the senate, 19 to 17, with a minority of the statewide senate vote, the Republican popular vote exceeding the Democratic vote by 17,827 votes. And arguably the Democrats captured the lower house also in 1970 with a minority of the vote, yielding a completely minority legislature. This latter statement is supported by the fact that in three districts Democrats ran unopposed, and treating the Republican vote there as absolute zero, the Democrats had a narrow statewide popular vote plurality of approximately 5,000. However, if the average Republican town vote in those districts be added to the Republican statewide house totals, to better reflect the actual feeling in the state, the slight Democratic popular vote plurality for the lower house turns into a deficit, and a minority victory. See Deposition of James F. Collins Single App., pp. 61-63, and *1971 Connecticut Register and Manual.*

ment, p. 7a). As potential state law issues they all were introduced in the state Superior Court mandamus proceeding in August, 1972, and pressed in the Connecticut Supreme Court on appeal. However, the Superior Court nevertheless issued the requested mandamus putting the Apportionment Board plan into effect for the 1972 election. *Miller* v. *Schaffer, Secretary of the State.* No. 173606 Superior Ct. Hartford County Filed July 27, 1972. The Connecticut Supreme Court affirmed, and reserved jurisdiction to await this Court's ruling on the federal issues. *Miller* v. *Schaffer,* No. 7238, Supreme Court, October 17, 1972.

None of the above issues is a federal issue under the Fourteenth Amendment *unless* either (a) directly productive of excessive population deviations which have not been shown, or (b) proven to be an element of political gerrymandering, *i.e.,* particularized invidious discrimination against identifiable voters, which likewise has not been shown. We will nevertheless comment on each of these alleged elements of the State Plan to show that even if they are factually descriptive of certain aspects of the State Plan they neither constitute proof of political gerrymendering nor are of independent constitutional concern.

(a) District shape, compactness

There is no succh thing as a "natural" shape for a legislative district, nor for that matter for a city, a county, a town, or an irrigation district. The relevant question is: Is voting power and fair representation of people invidiously affected? Compactness, or shape, as such, is irrelevant in answering this question.

District line drawing choices, selected from the almost infinite number of possibilities as to where lines could be placed (particularly under an extremely tight numerical equality rule), involve consideration of population equality, geographic and political subdivision features, and especi-

ally the unpredictable and changing residence patterns of the people. This last element goes to the crucial factor of political fairness or unfairness in districting. There is no "neutral" line. Noncompactness could be the only way to provide even minimal representation of a scattered minority, racial or political. Compactness can be defined in such inconsistent ways as pleasing symmetry of shape, or a population center of gravity principle designed to minimize travel distance for each resident to the population center.[65]

There is no federal constitutional requirement of compactness, let alone an agreed constitutional definition of compactness. There is recent authority for the proposition that compactness may be ignored in pursuit of a population equality purpose. *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 535-36 (1969). As already shown, Connecticut has not only achieved substantial population equality under the rule of *Reynolds* v. *Sims,* it has achieved near perfact equality (maximum deviance of less than 790 persons) in the light of the census units averaging approximately 1,100 persons which were available to the Board for use as reapportionment building blocks to create assembly districts averaging 20,000 persons.

(b) Town line cuts

Almost two-thirds of the Record in this proceeding is devoted to discussion and introduction of exhibits regarding town line cuts. However, town line cuts are irrelevant to both facets of the federal population equality issue in this case, i.e., whether presumptive constitutionality was achieved either by the deviations standing alone, or by the deviations in the context of the corollary rational policy of political fairness embodied in the plan.

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[65] Schwartzburg, "Reapportionment, Gerrymanders, and the Notion of Compactness," 50 *Minn. L. Rev.* 443 (1966); Crond, Inc., *REDIST: Program Description and User Manual* (National Municipal League, 1967).

Likewise, the cutting of local political unit lines to comply with the overriding federal equal population principle has never been deemed to constitute sufficient proof of political gerrymander. See *Badgley* v. *Hare*, 385 U.S. 114 (1966) (refusing to review a claim of political gerrymandering in Michigan related to county line cuts.) Even if the cuts were theoretically more numerous than would have been required to comply with the federal standard (which is a principle and not a mechanical formula), there would still be no proof of invidious discrimination; nor could there be such proof when the cuts are pursuant to a political fairness or balance principle.

All parties agreed that any reasonable interpretation of the equal population rule would require a large number of town line cuts in Connecticut. (Cross-examination of Mr. Vocelli, expert witness of plaintiff, Third Trans., Single Appendix, pp. 246-47). The State Plan cuts 47 towns of the 169 towns and results in 78 segments, the latter defined as a portion of a town in a district not wholly within that town (Mem. of Dec. Juris Statement, p. 5a). The three plans introduced by plaintiff-appellees which reduced the town line cuts, but not significantly, all involved increasing the population deviations.[66]

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[66] The following colloquy at trial between appellees' counsel Robert Satter and Apportionment Board Member George A. Saden is instructive on the Board's policy of keeping deviations as low as possible, and appellees' ambivalent position on the question whether the deviations were too high or really too low:

> Q. (Satter): Are you familiar with the fact that if you raise the percentage deviation above the plus or minus four percent that you could reduce the number of towns which were—town lines which were cut and the number of segments of towns, segmenting of towns? . . . A (Saden) . . . My only comment that I can make on that, Mr. Satter, is that it seems to me that would be flying in the face of the one man, one vote principle if you tried to increase deviations. I thought that the primary and essential factor behind the whole reapportionment scheme is to keep the deviations as low as reasonably possible. Trial Trans., Single App., pp. 40-41.

The figures for these plans are as follows: Pl. Ex. 20—population deviation, +4.02% and —4.08%, 36 towns cut, 49 segments; Pl. Ex. 21—population deviations, +5.88% and —5.97%, 31 towns cut, 39 segments; Pl. Ex. 22—population deviations, +7.43% and —7.32%, 27 towns cut, 35 segments. (See Trial Trans., Single App., pp. 226-229.) Thus even a policy of almost doubling the population deviation, from the 3.9% of the State Plan for House to 7.43% (Pl. Ex. 22), only reduces the number of towns cut from 47 to 27.

The one appellee's plan which has lower population deviations than the State Plan has more town lines cut than in the State Plan (Pl. Ex. 23, *id*, at 230). The figures for this plan are: population deviations, +1.6% and —1.01%, 58 towns cut, 88 segments.

Some additional appellees' exhibits on town lines seem to be straining at the trivial so far as federal constitutional issues are concerned. All of this material was also presented in state court after this Court granted a stay of the District Court judgment, but did not deter the state Superior Court from placing the State Plan in operation for the 1972 election, or the Connecticut Supreme Court from affirming. *Miller* v. *Schaffer*, No. 173606, Superior Ct. Hartford County, August 23, 1972; *aff'd*, Supreme Court of Connecticut, No. 7238, October 17, 1972. These exhibits purport to show that in a few isolated instances it would be possible to redraw certain district lines so as to eliminate a town line cut, or a segment, while staying inside the State Plan's maximum district deviation of 3.9%.[67] However, appellees do not and cannot claim that the suggested revised lines in these areas keep the population deviations, in these areas, as low as in the State Plan.

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[67] Pl. Exs. 5, 5a, 6, 6a, 7, 7a; Trial Trans., Single App., pp. 146-48, 204-09.

There is no standard, except political fairness, against which to judge the imponderables of (1) which town to cut, (2) how to cut it, and (3) given the non-mechanical nature of the federal population principle, how many towns to cut. The Supremacy Clause (Const., Art. VI, § 2) gives no guidance whatsoever on these practical questions. Arguably, if every town line in the state were cut, one might surmise that a state policy against town line cuts had been unnecessarily and unreasonably overridden. On the intermediate facts of the Connecticut case there is no workable standard of judgment to invoke, especially because town line cuts are only one of several elements to be considered in working out a reapportionment plan to achieve the *Reynolds* v. *Sims* goal of "fair and effective representation" in state government. 377 U.S. at 565-66.

(c) "Safe districts"

"Safe districts" are an endemic feature of legislative representation in the United States as they are in all democracies employing a district rather than proportional representation system.[68] Indeed, under proportional representation something even stronger than a "safe district" result eventuates, insofar as the political parties place their most senior incumbents at the top of the ballot list to insure that the core of the party leadership is always re-elected. [69]

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[68] See, *e.g.*, the comments and citations in Polsby, ed., *Reapportionment in the 1970s* 4, 5, 31, 149, 290 (1971). *See also* Sokolow, "Legislative Reapportionment and Party Competition in California, Institute of Governmental Affairs, University of California, Davis (1969); Campbell, et al., eds., *Elections and the Political Order* 202 (1966). See Mayhew, "Congressional Representation: Theory and Practice in Drawing Districts," in Polsby, ed., *Reapportionment in the 1970s*, 265, 276 (1971).

[69] Duverger, *Political Parties* (1954).

The District Court's opinion (Mem. of Dec., Juris. Statement, p. 7a) notes with apparent distaste the existence of "safe" and "swing" districts in the Apportionment Board's plan. No proof in the Record was cited, however, which tended to establish (1) that the Board's policies and plan produced a greater number of these districts than any other plan presented, (2) that the existence of these districts was at all a function of the minimal population deviations which exist, or (3) that the "safe" or "swing" districts were intended and did contribute to a political gerrymander aimed at a particular group of voters.

The District Court uncritically uses the term "safe district" as an epithet of opprobrium without realizing that an abundance of such districts is inevitable in any single member redistricting plan, except for the hypothetical case where voters allied with the contending political parties are spread absolutely evenly across the entire state. The fact of residential clusters of voters with similar political affiliations make the creation of districts with predictable election day performance inevitable.

If the supporters of political parties are *not* evenly spread and live in ascertainable clusters, there are three conceivable ways to go about dealing with the "safe district" issue. Initially, a determination can be made that there will be no "safe" seats, at least to the extent that past performances indicate that the strengths of the contending parties are not greatly disproportionate. This would be accomplished by consciously structuring each district so as to place within it the same number of supporters of each party as are placed in every other district. Very strange shapes would necessarily result, as might noncontiguity. All districts would thus be alike in balanced composition, *i.e.*, in each the vote would be proportional to the statewide strength of each party. In such a scheme, a statewide total for one party of 52% would mean a 52% majority for that

party in every district, with the result *not* that the party would receive 52% of the seats in the legislature, but that the party would receive *every* seat. See Single Appendix at 265.

A second approach would be ostrich-like and would ignore "safe" or "swing" seat possibilities. In theory, the apportioners would disregard the anticipated political effect of the lines they drew, relying instead solely on such considerations as compactness, contiguity and minimization of cutting of town lines, as well as the equal population principle. The inevitable multiplicity of district line alternatives, each possibility equally complying with the foregoing criteria, would be resolved by a coin toss or some other equally arbitrary device. "Safe" and "swing" districts and political favor, would still eventuate, because of partisan residence patterns but they would be known only after the plan was drawn.

The third alternative, adopted by the Connecticut State Constitution when it created a bipartisan Apportionment Board, is to subsume the "safe" versus "swing" district argument under the central reapportionment purpose of political fairness. The Board now has implemented the state constitutional mandate. Past voting performance, which is another way of expressing political residence patterns, indicate that in Connecticut each party has a core of approximately 60 safe seats in the House. The resultant Apportionment Board plan, based on a concern for political fairness and avoidance of minority elections like 1970, reflects that fact (Mem. of Dec., Juris. Statement, p. 7a), and then simply tries to avert the possibility of unfairness and minority elections by dealing as fairly as possible with the swing districts. Of course, given voter volatility and special circumstances, "safe" and "swing" districts are merely elements of prediction, and not hard and fast guarantees. The overriding purpose is to reapportion in such

a way that a party's aggregate of seats in the legislature will in some measure reflect that party's acceptance by the statewide electorate. This is the essence of responsiveness to the popular will in electoral politics. As Chief Justice Warren said in *Reynolds* v. *Sims:* "[I]t would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators." 377 U.S. 513 at 565.[70]

The acid test for safe districts is a record of continued electoral success for a given party in a given district. In Connecticut the record of state legislative elections of 1966, 1968 and 1970 shows that of 36 senate districts, 18 were carried by the Democrats in each election, 10 were carried by the Republicans in each election, and 8 were swing districts. As a policy matter there are differing views on the merits-demerits of safe and swing districts, and the optimum proportion of each. The former produce stability, experience (which may make oversight of the executive more effective), and continuous representation of stable communities of interest, *e.g.*, an ethnic constituency. The latter produce more sensitivity to even modest shifts in popular mood, more turnover, more interparty competition. They may also operate to virtually wipe out the weaker party, at least in terms of legislative seats, in landslide election situations, with resultant over-representation of the stronger party.

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[70] Appellees have criticized appellant's use of this quotation (Mot. to Affirm, p. 32). To be sure, in *Reynolds* the precise issue was gross population malapportionment creating rural-urban imbalance in legislative voice. But can it be hypothesized that the *Reynolds* Court was merely purporting to substitute one kind of potential minority rule for another? Was *Reynolds* concerned only with form and not with substance? Hardly so, because the fundamental goal was staked down as being "full and effective participation by all citizens in state government." 377 U.S. 565. The word "effective" cannot be ignored.

To speak of safe districts as "locking in" voters, as did the District Court (Mem. of Dec. Juris. Statement, p 11a), adds nothing to the constitutional argument. As has been demonstrated, all districting systems, unlike proportional representations systems, "lock-in" voters by the mere interface of districts with uneven "political residential" patterns. To "un-lock" locked-in voters would require extensive "political structuring" of the very sort objected to by the District Court in this case. In conclusion, as a federal constitutional matter there is no basis for mandating either a safe or a swing district policy or intervening in a state's political choice *unless* invidious discriminatory intent and effect can be demonstrated. These would be matters of pleading and proof of which this Record is devoid.

(d) Incumbency, i.e., preexisting distribution patterns in political representation

The District Court mentioned in passing, but again without a causal link either to population deviations or to invidiously discriminatory effects in the political gerrymander sense, that in a few isolated instances in district creation some "accommodation" was made on behalf of an incumbent (Mem. of Dec., Juris. Statement, p. 7a). Generically, this is simply a variation of the "safe district" argument, *supra*, and raises questions of political *representation policy* rather than *constitutional concern*. There are only isolated references to incumbency in the Record (*e.g.*, one of the few specific references in the Record is: Trial Trans., Single Appendix, p. 245).

As this Court observed in *Burns* v. *Richardson*, 384 U.S. 73 (1965), the minimizing of contests among incumbents (which is an even stronger protective policy than merely perpetuating some incumbents as part of a political balance spirit) "does not in and of itself establish invidiousness." 384 U.S. 73, 89 n. 16. This Court recently reiterated this *Burns* dictum in *Ely* v. *Klahr*, 403 U.S. 108, 112-13, n. 5 (1971), and thus avoided endorsing the incumbency lang-

uage of the Arizona federal district court. In *Ely* the lower court had invalidated a reapportionment plan on several grounds, including population inequality, prevention of contests between incumbents, and priority to safe districts—of which policies, however, were employed in a political fairness or political balance spirit. This Court's affirmance can rest on the population inequality ruling alone.

The most clear-cut example in the Record of aid to an incumbent (made at the request of the Democratic-selected Board Member, Judge Leo Parsky, and benefiting if at all the plaintiff-appellees' interest in the apportionment) was to "balance" the district of Ruby Cohen more in his favor (Trial Trans., Single Appendix, pp. 244-245). In the outcome, however, Mr. Cohen was defeated in the 1972 election under the Board plan. This fact illustrates that a policy of political fairness, (whether or not reflected in some supposedly "safe" districts and alleged perpetuation of some incumbents) does not predestine the outcome of an election. Actual unfairness and the danger of minority government is minimized, but political volatility remains.

More important as indicating the fundamental irrelevance of incumbency in the formation of the Board's plan is the fact that in forming the lower house (which was the more difficult task because of the larger number of districts), the Board at the outset cut the size from 177 to 151. (Dep. of James F. Collins, Single App., p. 114). This act had a devastating effect on incumbents. But it was done because use of 151 districts best accomodated the fundamental purpose of achieving close population equality (within the constraints imposed by the 1,100 persons average size of the census units used as building blocks), while at the same time attempting to minimize the number of town line cuts without increasing population deviations.

Mere presence of overt or covert consideration of an incumbency factor, absent any adverse effect on population equality or other proof of invidious discrimination, does

not warrant automatic invalidation of the plan under any federal constitutional principles thus far announced by this Court for state legislative reapportionment. The fundamental rule of *Reynolds* v. *Sims* is that some nonpopulation factors can be and indeed should be considered *provided* the effect is not to deviate from the basic rule of substantial population equality, 377 U.S. at 577-81, supported with regard to incumbency by the above quoted dictum of *Burns* v. *Richardson* and *Ely* v. *Klahr, supra.*

E. FAR FROM BEING AN INVIDIOUS POLITICAL GERRYMANDER, THE POLITICAL FAIRNESS PRINCIPLE UTILIZED CONJOINTLY WITH POPULATION EQUALITY IN THE PREPARATION OF THE CONNECTICUT APPORTIONMENT PLAN IS A MEANS REASONABLY ADAPTED TO AVERT A POLITICAL GERRYMANDER AT THE OUTSET

In the instant case, plaintiffs-appellees offer no proof at all of invidious discrimination caused by either political-racial or political-partisan gerrymandering. Instead the essence of the objection, which has almost an Alice in Wonderland quality in the light of conventional definitions of gerrymandering, is that even a benevolent consideration of past election results and other relevant political data is a species of impermissible gerrymandering. And they insist that this is so even if the purpose of recognition of such data is to try to achieve fairness in political representation, and to avoid a situation of political imbalance, *i.e.*, a situation of unequal political opportunity for all voters for the respective party candidates. We are talking about the relation of the general electorate to the ballot, which for all practical purposes contains only party candidates. Admittedly the Apportionment Board sought to avoid districting patterns under which, in the light of known political factors, it could be predicted that there was little prospect that voters for a given set of party candidates could not elect a fair number of legislators, *i.e.*, a number roughly proportional to the voter group's general strength in the

state.[71] Because minority process is certainly not due process, why should there by any constitutional infirmity in utilizing such political data to identify likely political pitfalls, and then devising districting patterns to avoid such pitfalls? Should not such knowledge as exists be used? Indeed, would it not be a derogation of responsibility for a bipartisan board not to consider political fairness and strive for the *Reynolds* goal of fair and effective representation?

The political system is of course too volatile for the Apportionment Board, or any other agency, to guarantee full, proportionate, representation without abolishing districts and going all the way to a proportional system of election.

The phrase "political balance" which the District Court repeatedly uses to characterize one of the Apportionment Board's three policies (the other two being population equality and minimization of cutting town lines) does not adequately encompass the personal constitutional values served by the Board's action. The election data used by the Board includes the vote of all voters, whether registered party members or not, because it is the general electorate which is dispositive on election day. Therefore, functionally viewed and related to personal values of "one man-one vote," the Apportionment Board's action, using readily

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[71] Plaintiffs' counsel's argument, when not bogged down in the town line question, was consumed in pointing to the political fairness principle of the Board, but not to showing (a) that it caused any demonstrable increase in population deviations, (b) that it caused any invidious discrimination or decrease in political opportunity of voters, (c) that there was any other plan which would be fairer or provide more political opportunity. And plaintiffs' counsel admitted that blind pursuit of population equality will not avoid political gerrymandering, i.e., there "can be equality and still be political gerrymandering." (Trial Trans., pp. 165-66, Arguments of counsel, not printed in Single Appendix.)

available and relevant data, was an attempt to devise districts which would create fair political opportunity for all voters in selecting public office holders.

In short, what the Apportionment Board in Connecticut did, in accord with the *Reynolds* v. *Sims* purpose of fair and effective representation was to maximize opportunities for effective voter access to the political system by avoiding potential conditions of invidious discrimination which were revealed when past political performance was applied to tentative sets of new districts.

Especially instructive in this connection is the comment of former Chief Judge William J. Campbell of the United States District Court for the Northern District of Illinois, and one of America's most experienced reapportionment judges. In 1965 Chief Judge Campbell worked out a generally approved reapportionment of the Illinois senate, (and subsequently a congressional redistricting, too) by an ad hoc bipartisan pretrial conference directly analogous to the operation of the Connecticut Apportionment Board. *Germano* v. *Kerner,* 247 F. Supp. 141 (N.D. Ill. 1965); see also *People ex rel. Scott* v. *Kerner,* 211 N.E. 2d 736 (1965); *Kirby* v. *Illinois Electoral Board,* 251 F. Supp. 908 (N.D. Ill. 1965). At a press conference at the successful conclusion of his efforts he responded as follows to questions concerning the propriety of considering political data:

> "I certainly did; it's a necessary part of trying to work out a fair and balanced set of districts, from the standpoint of the interests of each political party. But there is crucial difference between considering political factors in an attempt to do justice to each party in regard to provision of safe and swing districts, and a one-sided partisan political gerrymander for the advantage of one party alone." *Democrat Representation* 312-13.

It is common knowledge that in the minority of states where there is no provision for a bipartisan commission the

starting point on reapportionment is a marshalling of relevant political data as well as bare census data. The process may be overt or covert, and if one political party controls the legislature and governship the districting process can be carried through on behalf of one political party without any counter-check, other than the uncertain possibility of subsequent judicial review of charges of political gerrymandering. The bipartisan commission with tie breaker, by contrast, is a promising attempt to institutionalize fairness in the very process of reapportionment. And yet the District Court ruling below puts this whole new development in question. For how can a bipartisan commission operate, as hoped, to ameliorate partisanship unless it is conscious—overtly conscious—of political realities?

It is impossible to de-politicize an intrinsically political process, nor is that the purpose of *Baker* v. *Carr* and the resultant reapportionment revolution. The purpose of *Baker* and its progeny is to terminate population malapportionment by requiring substantial population equality in formation of legislative districts. Courts can no more take politics out of a process which is the core of the American political representation system than King Canute could still the waves. Indeed, the approach of the District Court ruling below seems to point in the direction of reapportionment by lottery (for how else could we be sure that no political data were considered), rather than in the direction approved by the Connecticut Constitution of a good faith and even bipartisan effort to create broader and fairer conditions of political opportunity, which necessarily must include some recognition of political data.

As one astute member of an apportionment commission phrased the matter a few years ago:

> "Every plan has a political effect, even one drawn by a seventh grade civics class whose parents are all nonpartisans and who have only the United States census

data to work with. Even though they drew such a plan with the most equal population in districts, following the maximum number of political subdivision boundaries and with the most regular shapes, it could very well result in a landslide election for a given political party." [72]

The plaintiffs' position below on this point, which the District Court mistakenly adopted, accords with no known definition of gerrymandering. All definitions focus on invidious purpose or effect or both, designed to misrepresent rather than to better represent the voting strength of voters supporting particular candidates or causes.[73] The gerrymander deals with "partisan or factional advantage," [74] to secure for the gerrymandering faction a voting strength in the legislature they could not secure at the polls. The evil of the gerrymander is that it turns the structure back upon itself: it structures representation so that some faction will not receive its fair share of representation. Clearly, then, to structure representation with an eye to "fairness" is to do the one thing that best assures against a gerrymander.

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[72] A. Robert Kleiner, Democratic Member of Michigan Reapportionment Commission, National Municipal League Speech, 1966, quoted in Dixon, *Democratic Representation:* Reapportionment in Law and Politics 436 (1968).

[73] Key, *American State Politics* 64-65 (1956); Hacker, *Congressional Districting* 54 (1964).

[74] Baker, "Gerrymandering: Privileged Sanctuary or Next Judicial Target?" in Polsby, ed., *Reapportionment in the 1970s* 121 (1971).

IV. THE REAPPORTIONMENT DEVICE OF BIPARTISAN COMMISSION (OR BOARD) WITH TIE BREAKER FOUND IN CONNECTICUT AND SEVERAL OTHER STATES IS AN INNOVATION WHICH NOT ONLY COMPORTS WITH ANY DEGREE OF POPULATION EQUALITY WHICH MAY BE CONSTITUTIONALLY MANDATED BUT ALSO INSTITUTIONIZES A PROCESS FOR EXPEDITIOUS AND FAIR DISTRICTING WITH MINIMUM NEED FOR JUDICIAL INTERVENTION; NOR WERE THERE ANY INFIRMITIES IN THE ACTUAL OPERATION OF THE CONNECTICUT BOARD —A QUESTION RAISING ONLY A STATE LAW ISSUE ABSENT PROOF OF (1) IMPERMISSIBLE AND UNJUSTIFIABLE POPULATION DEVIATIONS OR (2) A PROVEN INVIDIOUSLY DISCRIMINATORY EFFECT, IN NON-POPULATION TERMS, ON PARTICULAR VOTERS OR GROUPS OF VOTERS

A. THE BIPARTISAN COMMISSION WITH TIE BREAKER DEVICE HAS UNIQUE VIRTUES AS A METHOD TO DISCHARGE THE APPORTIONMENT FUNCTION, AND NECESSARILY INCORPORATES A POLITICAL FAIRNESS PRINCIPLE BECAUSE THE PURPOSE OF ITS CREATION IS TO AVOID UNFAIRNESS IN THE CONSTRUCTION OF THE PLAN ITSELF

Courts can police the population equality component of reapportionment and redistricting, but a bare numbers approach is consistent either with grossly unfair or fair districting practices. There are severe limitations on what courts can do concerning the crucial districting choices which determine the operating fairness of a reapportionment plan, even if political gerrymandering be deemed justiciable under a severe burden of proof. The states, however, through legislative and state constitutional processes, can experiment with ways to curb unfair partisan impulses, whether covert or overt. One of the most promising recent developments in the states, which has received frequent praise in the literature of reapportionment,[75] is

[75] O'Rourke, Reapportionment: Law, Politics, Computers, AEI Domestic Affairs Study No. 1, pp. 96-97 (1972).

the device of bipartisan commission with tie breaker.[76] And it is implicit that such a commission, to be effective and perform its intended mission, cannot operate in politically-blind, chance fashion.

The bipartisan commission device institutionalizes a process whereby:

(1) An outright partisan apportionment by one party may be avoided;

(2) Consideration of political fairness may be identified and brought into the open in the process of districting (*i.e.*, "representation" which the dissenters in *Baker* v. *Carr*, 369 U.S. 186 (1962), feared would be ignored);

(3) Reapportionment may be accomplished expeditiously by a fixed deadline without repetitive court orders;

(4) A reapportionment plan will emerge which will be entitled to some presumption of constitutionality by the very nature of its creation, subject always to corrective judicial review if there be proof of invidious intent or effect, short-changing the votes or effective representation of identifiable elements of the voting population;

(5) As many organized political interests are incorporated into the reapportionment process as is feasible, in view of the traditional American district system of legislative representation, which tends to produce a two-party system. Third party representation in creating the apportionment agency can be recognized if desired, and is so recognized in the formula incorporated in the Connecticut Constitution. It would not be feasible, of course, to have either the legislature or the apportioning agency mirror the detailed clusters of interests in the population without going all

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[76] In some states the new bipartisan commission with tie breaker device replaces the legislature as the reapportionment agency: N.J. Const. Art. XI, §5 (1966); Pa. Const. Art. II, §§ 16, 17 (1968); Hawaii Const. Art. III, §§ 2, 4, as amended (1968). In others it exists as a backstop in event of legislative (or legislative-governor) deadlock: Conn. Const. Art. III, § 6 (1965); Ill. Const. Art. IV, § 3 (1970).

the way to the European system of proportional representation. In short, the population equality principle, satisfied here, and a rational state policy of political fairness, taken together, encompass all relevant representation values. Operating together, the two principles are the very antithesis of invidious political gerrymandering. A plan so devised is entitled to a strong presumption of constitutionality, and thus safeguards the judiciary against unnecessarily becoming enmeshed in political litigation.

B. THE OPERATION OF THE CONNECTICUT APPORTIONMENT BOARD IN NO WAY ADVERSELY AFFECTED THE VALIDITY OF THE BOARD'S PLAN

In the latter part of their Motion to Affirm (pp. 36-39), appellees make a number of observations on the operation of the Apportionment Board, explicitly identifying some Republican (the legislative minority) political party affiliations, and raising other questions seemingly grounded on dislike of the final plan from a partisan ("Democratic") standpoint. Rather than cast their argument in such forthright terms, however, appellees have characterized themselves as "citizens and voters who assert their individual and personal rights under the Equal Protection Clause." *Id.* at 36. This characterization is incomplete because it fails to mention the Democratic interests in the suit through the plaintiff-appellees and their counsel. (*See,* Statement of Facts, Events After District Court Judgment, note 4, *supra.*)

In this setting, therefore, the past political affiliations of Judge Saden and Mr. Collins, which appellees dwell on at length (Appellees' Motion to Affirm, p. 37) while disregarding the prior affiliation of Judge Parskey with the reapportionment interests of the Democratic party (Single App., p. 38), do not appear to be pernicious as appellees have sought to make them. It should come as no surprise that board members and aides had political party affiliations, because the Apportionment Board is specifically set up as a bipartisan board, not nonpartisan; the purpose is balanced partisanship in the selection of the Board and its

third member, and in opportunities for negotiation and publicity.

It is noteworthy that in their attempted attack on the operation of the Board, the appellees do not, and cannot, allege that the Board members were improperly selected or that one or more of the Board members was prevented from participating. Both Judge Saden and Judge Parskey were selected by the legislative leaderships of the minority and majority parties as mandated by the state constitution. Further, it is clear that Judge Parskey prepared for Judge Saden a list of six names acceptable to Judge Parskey as the third or tie-breaker member, and that Judge Saden selected one of the six, Supreme Court Justice Thim (see Section II-C-1, *supra*, text accompanying note 49). Accordingly, there was no infirmity in the processes by which the three Board members were selected.

The processes were similar to those used in setting up the Pennsylvania bipartisan commission—except that there the tie-breaker was appointed by the state Supreme Court. The plan produced by this analogous Pennsylvania process was sustained by the state Supreme Court and this Court dismissed the appeal. *Commonwealth ex rel. Specter* v. *Levin*, 293 A.2d 15 (1972), *appeal dismissed sub nom. Specter* v. *Tucker*, —— U.S. ——, 41 U.S.L.W. 3181 (October 10, 1972) *for want of a substantial federal question.*

With respect to the operating procedures of this small three-man Board, appellees try to recast the extensive effort of Judge Saden (aided by Mr. Collins) into the basis for a claim that they not only worked on plans for each house (allegedly favoring the Republicans) but then somehow overcame Judge Parskey and forced their handiwork on Justice Thim at the eleventh hour. What appellees failed sufficiently to explain, however, is that after preliminary work and discussion on competing plans for the senate and after a vote taken on the senate plans where Judge Parskey was outvoted, Judge Parskey withdrew from further active participation. Accordingly, a plan was completed by Judge Saden for the lower house which re-

ceived Justice Thim's concurrence. Judge Parskey dissented, but filed no alternative plan nor any detailed critique of the Board plan. In this regard, there is no truth to appellees' assertion (Appellees Motion to Affirm, p. 36) that "Justice Thim . . . had no choice but to sign it." Such a statement demeans Justice Thim. First, no one forced him to do so, second, he had ample opportunity to contribute to the policies of population equality and political fairness, and third, no other plan was presented by Judge Parskey or anyone else.

Because there was no demonstrated invidious districting at the expense of one party, the mere fact of party affiliations of Board members has no more significance than the party affiliations at the two prior stages which failed to reach agreement on a districting plan—the failure to get a two-thirds vote in the legislature, and the failure to get a three-fourths vote in the bipartisan legislative commission. (See Section II-C-1, *supra.*)

It is significant that appellees do not follow up their criticism of the operation of the Apportionment Board with any proof of particular instances of invidious discrimination. The political fairness principle, used by the Board as a corollary to the preeminent population equality principle, was itself in accord with the fundamental antigerrymandering purpose of Connecticut in creating a bipartisan mechanism for apportionment.

The composition and operation of bipartisan apportionment boards do not present a cognizable Fourteenth Amendment claim absent proof of invidous discrimination. Here there is no proof of discrimination in the selection process, the operation, or the result.

USION

For the reasons sta[e], which demonstrate that the Connecticut state legi[reapportionment plan does not violate the United St[stitution, the judgment of the court below should b[ed and the case remanded to the District Court wi[ion to enter an order dismissing the complaint of s-appellees.

Re[y submitted,

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APPENDIX A: STATE MALAPPORTIONMENTS—1964

Statistical Measures Of "Malapportionment" In The Fifteen State Legislatures Held Unconstitutional By The United States Supreme Court, June 15 And June 22, 1964

State	Minimum Population theoretically able to control a majority of the seats		Population variance ratio	
	Senate	House	Senate	House
Alabama				
Existing apport.	25.1%	25.7%	41-1	16-1
67 Senator Amendmt.	19.4%	43.0%	59-1	4.7-1
Crawford-Webb Act	27.6%	37.0%	20-1	5-1
Colorado				
Existing apport. (Amendmt. No. 7)	33.2%	45.1%	3.6-1	1.7-1
Prior apport.	29.8%	32.1%	8-1	8-1
Delaware				
Existing apport. (1963 Amendmt.)	21.0%	28.0%	15-1	12-1
Prior apport.	22.0%	18.5%	15-1	35-1
Maryland				
Existing apport. (1962 revision of lower house)	14.1%	35.6%	32-1	6-1
Prior apport.	14.1%	24.7%	32-1	12-1
New York				
Existing apport	41.8%	34.7%	3.9-1	21-1
Projected apport. under revision due by 1966 (under state constit. standards)	38.1%	37.5%	2.6-1	12.7-1
Virginia	41.1%	40.5%	2.65-1	4.36-1
Connecticut	32.0%	12.0%	8.1-1	424.6-1
Florida	14.1%	22.9%	38.1-1	23.3-1
Idaho	16.6%	32.7%	102.2-1	17.0-1
Illinois	28.7%	39.9%	10.6-1	4.9-1
Iowa	35.2%	26.9%	8.9-1	16.8-1
Michigan	29.0%	44.0%	12.4-1	3.9-1
Ohio	41.0%	30.3%	1.9-1	9.4-1
Oklahoma	24.5%	29.5%	26.4-1	13.9-1
Washington	33.9%	35.3%	7.3-1	4.6-1

Source: The figures for the first six states listed, Alabama through Virginia, are taken from the Supreme Court opinions as reported in 377 U.S. 533 *et seq.* (1964). The figures for the last nine states, Connecticut through Washington, are taken from National Municipal League, *Compendium on Legislative Apportionment,* 1963 Supplemental Chart.

APPENDIX B: SUMMARY OF CENSUS DATA UNITS AVAILABLE FOR USE BY THE CONNECTICUT APPORTIONMENT BOARD

The total number of block groups/enumeration districts that the reapportionment board had to work with in reapportioning the Connecticut Legislature was 2746.* These areas broken down by population showing the following:

Population Size of Area	No. of Areas of This Size	Approx. % of Total No. of Areas
0-99	83	3
100-199	82	3
200-299	75	3
300-399	90	3
400-499	109	4
500-599	127	5
600-699	179	7
700-799	180	7
800-899	225	8
900-999	212	8
1000-1099	189	7
1100-1199	197	7
1200-1299	171	6
1300-1399	136	5
1400-1499	120	4
1500-1599	94	3
1600-1699	93	2
1700-1799	61	2
1800-1899	48	2
1900-1999	58	2
2000-2099	31	1
2100-2199	39	1
2200-2299	23	1
2300-2399	18	1
2400-2499	16	1
2500-2599	16	1
2600-Up	74	3

* This is approx. + or — 50

The Assembly district breakdown by deviation from the perfect sized district is as follows:

Pop. Deviation From Perfect Sized District	No. of Districts
0-99	21
100-199	12
200-299	24
300-399	23
400-499	15
500-599	19
600-699	19
700-799	18
	Total 151

The Senate district breakdown by deviation from the perfect sized district is as follows:

Pop. Deviation From Perfect Sized District	No. of Districts
0-99	6
100-199	2
200-299	5
300-399	6
400-499	4
500-599	3
600-699	6
700-799	3
	Total 36

Sources: The first tabulation above gives the census unit distribution from which the condensed summary in the Fact Stipulation (Single App., p. 131) was derived. The second two tabulations derive from the Census Certification of Senate and Assembly District Populations (Single App., 141). Both were prepared by James F. Collins.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1476

J. BRIAN GAFFNEY,

Appellant,

v.

THEODORE R. CUMMINGS, ET AL.,
NANCY ARONIE, ET AL., and
THOMAS J. MESKILL, Governor of the State of
Connecticut, ET AL.,

Appellees.

BRIEF FOR APPELLEES, THEODORE R. CUMMINGS, et al.

Questions Presented

1. Does the Board Plan, with a deviational range for the House of 7.83%, meet the constitutional standard of equality that legislative districts be "as nearly of equal population as is practicable," when the lower court recognized as valid and accurate an alternative plan with a deviational range of 2.61%?

2. Does the admitted political structuring employed by the Board, which sought to achieve a proportionalization of political parties' strength and which the lower

court found caused the deviations in the Plan, justify the Plan failing to comply with the constitutional standard of practicable equality?

3. Does the irrational consequences of the political structuring principle which caused bizarrely shaped districts, the unnecessary fragmentation of towns, the arbitrary creation of safe districts, and a gigantic attempt to maneuver the outcome of elections, not only disqualify political structuring as a justification for the deviations, but also cause an invalidation of the Plan itself?

4. Can the Plan, which is, on its merits, constitutionally defective, become constitutionally valid because of the form of the reapportionment board which created it?

5. May the Supremacy Clause be applied in this case so as to permit, a higher deviation among the legislative districts than the lowest that is practicable, in order to give the maximum respect to a state constitutional policy of preserving town lines and thereby achieve a better accommodation between the Federal and the Connecticut State Constitutions.

Summary of Argument *

The District Court faithfully followed the leading cases of this Court on legislative reapportionment and its decision is justified by both the evidence and the law.

The District Court applied two criteria to determine the constitutionality of the Plan: (1) Whether or not the Plan met the standard of equality required under the Equal Protection Clause and (2) If it did not, whether the deviations of the Plan were justified by a rational state policy.

On both counts, the District Court found the Plan defective and held it "in violation of the Fourteenth Amendment to the Constitution of the United States" (Memo. of Dec., App., p. 8a in Appellees' Motion to Affirm).

(1) Standard of Equality.

The District Court applied the standard that "deviations from absolute numerical equality which are more than minimum may not be allowed unless they are . . . the unavoidable result of attempts to obtain precise equality (Memo. of Dec., App. p. 9a in Appellees' Motion to Affirm). Essentially this is the same as the standard enunciated by this Court in *Reynolds* v. *Sims*, 377 U.S. 533 at p. 577 (1964) that legislative districts shall be "as nearly of equal population as is practicable" and later refined and made more exact in *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530-531 (1969) that the state must make a good faith effort to "achieve precise mathematical equality," and there is permitted "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality."

---

* This summary of argument also states the operative facts determinative of this case.

The District Court found that the House districts in the Board Plan deviated from the perfect average by a maximum of plus 3.93% or 789 people and by a minimum of minus 3.90% or 784 people for a total deviation of 7.83% or 1573 people. It concluded these deviations were avoidable and a "closer approach to equality could be achieved with the materials at hand" (Memo. of Dec., op. cit. at p. 7a).

In support of this conclusion, the lower court referred to Plaintiffs' Exhibit 23 (Single App., p. 181). This exhibit was a reapportionment plan submitted to the court by the Appellees, for the House with the same number of seats as the Board Plan and based on the same census material as available to the Board. It was prepared by a conceded expert in Connecticut reapportionment and neither the expertise of the author nor the accuracy of Plaintiffs' Exhibit 23 was ever questioned by the Appellant. This plan demonstrated that the deviations could be reduced to plus 1.6% above equality and minus 1.01% below equality for a total deviation of 2.61%. When these deviations are compared with the 7.93% deviation of the Board Plan, the lower court was justified in concluding that the Board had not complied with the requirement of practicable equality.

The Appellant has sought in his brief to escape the legal consequences of the Plan's failure to meet the constitutional requirement of practicable equality by a number of adroit arguments.

(a) He claims that because the deviations from equality in the House Plan were less than the average population of the census units utilized in the creation of the Plan (1100 people) the deviations are unavoidable. However, the census unit average (which is simply an average arrived at by dividing the population of the state of 3,012,170 by the number of census units then available to the Board of 2,746) has no statistical meaning in itself and has no opera-

tive utility in the development of a reapportionment plan. The significant fact is not the average population of census units but the population of the smallest census units available to the Board and whether or not there was a sufficient number of these units to create a Plan. This is so because districts are created by adding census units together. Since there were a sufficient number of census units with a population of below 300 people (240 of such units to make 151 legislative districts) there was no difficulty whatever in achieving a population deviation of significantly less than the census unit average of 1100 people and than the population deviation in the Plan of 800 people.

(b) The Appellant argues that this Court should adopt a *de minimis* rule as a ground for ignoring the Plan's 7.83% deviation. However, when such a *de minimis* rule was urged in *Kirkpatrick*, this Court specifically rejected it on the grounds that there was no non-arbitrary way to pick a cut-off point and, moreover, if one were established, it, rather than precise equality, would become the target at which reapportioning authorities would aim.

(c) The Appellant argues that the Court should adopt a rule of presumptive constitutionality in the one-man, one-vote cases. This Court has refused to apply such a presumption in cases involving basic civil rights but rather has imposed upon the states in such cases, the obligation to explain why it is denying to its citizens these fundamental rights.

(d) The Appellant finally argues that the standard of equality most forcefully announced in *Kirkpatrick* should be changed. The complete answer to this contention is the extraordinary success achieved by the application of the *Kirkpatrick* standard throughout the country.

This success is dramatically revealed by a comparison of the range of deviations * approved by lower courts and established by reapportioning authorities in the period prior to *Kirkpatrick* (1969) and in the period after *Kirkpatrick*.

Deviations Prior to 1969

Range of Deviation:	*Number of States*:	*Percentage of States*
	Senate:	
Under 1%	0	0%
1-5%	1	2%
...	...	...
Over 15%	44	88%
	House:	
Under 1%	0	0%
1-5%	1	2%
...	...	...
Over 15%	48	96%

Deviations after 1970

Range of Deviation:	*Number of States*:	*Percentage of States*
	Senate:	
Under 1%	3	6.7%
1-5%	21	46.7%
...	...	...
Over 15%	8	17.8%
	House:	
Under 1%	4	9.5%
1-5%	16	38.1%
...	...	...
Over 15%	10	23.8%

* As used in this brief, "range of deviation" is the sum of the percentage deviation the largest and smallest district vary from equality. Thus, if the largest district is 5% more populous than the population of the perfect average district and the smallest district is 3% less populous, then the range of deviation is 8%.

In the period prior to 1969, only 2% of the states had a deviational range for either their senate or their house within the 1-5% bracket and 88% of the states for the senate and 96% of the states for the house had deviational ranges of over 15%.

However, after the *Kirkpatrick* decision in 1969, the situation dramatically changed. Lower courts have applied the *Kirkpatrick* rule to state legislative reapportionment and they have specifically refused to adopt any *de minimis* rule. The result has been that in the reapportionments since 1970, 53.4% of the states for the senate and 47.6% for the house, have achieved a deviational range of 1-5%. Moreover, since 1970, only 17% of the states for the senate and 23% of the states for the house have deviations in excess of 15%.

This Court's insistence upon equality through the application of the *Kirkpatrick* standard is the primary cause for this remarkable achievement.

(2) Lack of Justification for the Deviations.

In this case, the deviations having been found to be avoidable, the burden then shifted upon the state to offer an explanation.

The evidence revealed that the Board creating the Plan was obsessed with a desire to politically structure the districts in order to assure that each political party elected the number of its candidates to each house of the legislature in proportion to each party's total of all the votes all its candidates received in all individual district elections.

The District Court found that political structuring caused the deviations in the Plan and that, if it were eliminated, a closer approach to equality could have been achieved. The District Court further found that political structuring was not a legitimate state interest that could

justify the deviations. The court was totally warranted in so holding.

This Court has precisely held in *Kirkpatrick* that the problems created by partisan politics, by a desire to achieve bipartisan cooperation, or by a putative purpose of avoiding partisan gerrymandering, do not justify population deviations in a reapportionment plan.

The underlying reason for rejecting these political excuses is that they open the door too wide to subterfuges for failing to achieve the standard of equality required by the Constitution.

The Appellant argues most persistently in his brief that the political structuring employed by the Board should be permitted to justify the Plan's deviations because of the purity of the Board's motives to achieve a "fair" representation between the political parties. The answer to this contention is that there is no way of defining the term "fairness" nor determining by any objective testing whether or not the Board achieved this putative objective. In fact, based upon the use of the Plan in the 1972 election, the Plan did not achieve the proportionalization claimed by the Board between the state-wide total vote of each party's candidates and the number of legislators elected. But regardless, since "fairness" can neither be tested nor defined, it, like the practical political excuse, simply opens the escape hatch too wide if allowed to justify the Plan deviating from the requisite standard of equality.

Moreover, were this Court to accept the notion of justifying deviations on the basis of "fair representation" between the political parties, it would involve itself in "political questions" which are beyond judicially created standards or judicial management.

Essentially the whole notion of political structuring adopted by the Board, rests upon the premise that there is a meaning to the statewide total of all the votes cast for each political party's candidates in single district elections. In fact, that total has no meaning at all and is not a rational number. The use of that total as the basis for proportionalizing parties' strength, renders the political structuring principle itself an irrational standard. Its pervasive use in the development of the Plan created irrational results. Among them were bizarrely shaped districts, unnecessary fragmenting of town lines, and the arbitrary creation of safe districts. Moreover, the attempt to structure districts to achieve particular political ends unrelated to the one-man, one-vote doctrine, rendered the Plan a gigantic **gerrymander.**

Clearly, political structuring cannot be a justification for the deviations of the Plan. Furthermore, the widespread application of this irrational principle and the irrational results and consequences it caused, warrant invalidating the Plan.

Approving the Board's political structuring methods in this case would have the national consequence of sanctifying the mutilation of legislative districts in other states throughout the country and authorizing more effective methods for manipulating the outcome of elections.

The Plan having failed to meet constitutional requirements cannot be raised to constitutional validity by the form of the reapportionment board which created it. The Plan must be judged on its merits and the focus should be not on *who* created the Plan but on *what* they created.

In fact the evidence reveals the Plan was not the product of a deliberative bipartisan reapportionment board acting non-politically. Rather the Board functioned as a one-man operation of one member assisted by his counsel. There

were no meetings whatsoever by the Board on the House Plan and it never met as a Board to approve the entire Plan. The tie-breaking member was handed the Plan on the last day of the constitutional deadline and had no choice but to accept it. The Board consequently is not entitled to a presumption of fairness and the criteria for determining the constitutionality of its work must be the same as applied in *Reynolds, Swann,* and *Kirkpatrick*.

If this Court reinterprets its prior decisions so as not to require that a reapportionment plan for state legislatures comply with the stringent *Kirkpatrick* standard of equality, then this Court should apply the Supremacy Clause so as to allow deviations higher than in the Board Plan in order to give the maximum feasible effect to the valid state policy, expressed in the Connecticut State Constitution, of preserving town lines. This Court has long recognized that whenever possible, accommodation should be achieved and conflict minimized in the interpretation of the provisions of both the Federal and State Constitutions.

ARGUMENT

I. The Board Plan of Apportionment fails to comply with the Federal Constitutional requirement under the Equal Protection Clause that legislative districts be "as nearly of equal population as is practicable."

A. The Constitutional Foundation of the one-man, one-vote doctrine.

When a legal doctrine becomes as encrusted with the pronouncements and prophecies of the pundits as the one-man, one-vote doctrine, it is helpful to start with a review of the fundamental constitutional grounds upon which this Court's initial decisions were made.

Reapportionment cases basically deal with the right of citizens to participate in the process of electing their government. The one-man, one-vote doctrine is rooted in the "constitutionally protected right to vote". *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964). That right includes "the right to have the vote counted at the full value without dilution or discount". Id. at p. 555, quoting Justice Douglas' dissent in *South* v. *Peters*, 339 U.S. 276, 279 (1950). "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting free exercise of the franchise." *Reynolds* at p. 554.

Diluting the weight of a vote because of the place of residence of a citizen constitutes invidious discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment just as much as the denial of the right to vote because of race (*Reynolds* at p. 566).

The Equal Protection Clause of the Fourteenth Amendment provides: "No state shall . . . deny any *person* within its jurisdiction equal protection of the law." Thus, the

right impaired by an apportionment scheme which violates the Equal Protection Clause is "*individual* and *personal* in nature" (Reynolds at p. 561).

The individual and personal quality of the right to an equally weighted vote is echoed in *Lucas* v. *Colorado Gen. Assembly*, 377 U.S. 713, 737 (1964), wherein this Court noted with approval the dissent of Judge William E. Doyle, saying: "The rights here asserted are the right of *individual* plaintiffs to have their votes counted equally with those of other voters" (emphasis added). See *Lisco* v. *Love*, 219 F. Supp. 922, 944 (D. Colo. 1963).

We emphasize that the one man, one vote doctrine, through the mechanism of the Equal Protection Clause, equates the fundamental right to vote with the personal right to an equally weighted vote[1] for two purposes: first, to justify the standard of equality developed by this Court; and second, to distinguish this *personal* right from a *group* right to representation. It is this personal and individual right that the Appellees have asserted throughout this case.

On the other hand, the theme running through Appellant's brief is that a correlation must be achieved between "the form of apportionment" (which he likens to equality in districting) and "the function of representation" (which he likens to a balance of political party strength in the legislature). However, representation is a very complex concept and has implications unrelated to equality of the vote.[2] It involves the role of the legislator in fulfilling the will of his constituents. Representation, as used by the Appellant, also concerns the division of political power between the political parties.

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[1] See, O'Rourke, *Reapportionment, Law, Politics, Computers, A.E.I., Dom. Aff. Studies*, No. 1 Feb. 1972, at Page 18.

[2] See Irwin, *Representation and Election: The Reapportionment Cases In Retrospect*, 67 Mich. L. Rev. 729 (1969) p. 747-752.

At this point, it is sufficient to emphasize that the right of an individual to an equally weighted vote and the right of any interest, including a political party, to representation belong to essentially different constitutional orders. Concern for representation would lead this Court into political questions which are beyond judicial standards to determine.[3] The Appellant's attempt to lead the Court in that direction is a siren call to disaster.

Rather, this Court, in the application of the one-man, one-vote doctrine, has acted upon the suffrage question alone, asserting the constitutional right of each citizen to an equally weighted vote. The furtherance of that right is precisely what this Court has accomplished in the reapportionment cases, and no more. That is enough. The great success that this Court has achieved should be both recognized and acclaimed.

B. The Standard of Equality.

At the outset, it is worth stating the standard of equality which this Court has utilized in the one-man, one-vote cases. From the beginning of the reapportionment litigation, this Court has, without variation, held that equality of population must be the touchstone against which any plan of districting must be measured. In *Wesberry* v. *Sanders,* 376 U.S. 1, 7-8 (1964), the Court held that "as nearly as is practicable, one-man's vote in a congressional election is to be worth as much as another's."

The same standard was applied to state legislative plans of apportionment in *Reynolds* v. *Sims, supra*, wherein this Court held that: ". . . the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of a legislature, *as nearly of equal population as is practicable*" (emphasis added). 377 U.S. at p. 577.

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[3] *Id.*

Then, in *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530-531 (1969), this Court indicated that as equal as practicable meant that the state must make a good faith effort "to achieve precise mathematical equality", and there is permitted "only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality . . .".

The District Court below in this case adopted precisely the same standard. The Court said: "The constitutional principle of the vote cases appears to be that deviations from absolute numerical equality which are more than minimal may not be allowed unless they are . . . the unavoidable results of attempts to obtain precise equality . . ." (Memo of Decision, App. p. 9a in Appellees' Motion to Affirm).

C. Failure of the Plan to achieve practicable equality.

The District Court found that the House districts[4] in the Board Plan deviated from the perfect average by 3.93% above the average and by 3.90% below the average for a total deviation from the largest to the smallest district of 7.83%.[5] It concluded that these deviations did not meet the standard of equality adopted by this Court. The evidence in this case justifies that finding.

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[4] Throughout the trial of this case and in this appeal, no issue has been made of the deviations in the Board's Senate districts. The lower court was correct in declaring the entire Plan unconstitutional when the deviations in one House did not meet the requisite standard. It was following the rule of this Court that "a court in reviewing an apportionment plan must consider the scheme as a whole." *Burns* v. *Richardson*, 389 U.S. 73, 83 (1966). In accord is *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964).

[5] In the recent case of *Connor* v. *Williams*, 404 U.S. 549 (1972), this Court refers to percentage deviations in a reapportionment plan as the sum of (a) the percentage that the largest district varies from precise equality, plus (b) the percentage that the smallest district varies from precise equality. We will follow that practice in this brief and call that sum the range of deviation.

The Appellees submitted a plan for House districts in which the deviations did not exceed a high of 1.6% above the ideal and a low of 1.01% below the ideal or a total deviation from the largest to the smallest of 2.61% (Plaintiffs' Ex. 23, Single App. p. 181; Testimony of Vocelli, Single App. pp. 229, 230). This plan was based upon the same census data as was available to the Board. It was prepared by Thomas Vocelli, who had worked on Connecticut reapportionment for the legislative reapportionment committee, for the eight man commission and assisted the Board (Single App. pp. 201-202). He was qualified at the trial as an expert and accepted as such by the lower court and by the Appellant. That the District Court gave credence to Appellees' 2.6% plan as valid evidence of how the districts could achieve substantial equality is indicated by the Court specifically referring to Plaintiffs' Ex. 23 in its opinion (Memo of Dec., Single App. p. 7a in Appellees' Motion to Affirm). Appellees' 2.6% plan had been submitted to Appellant's counsel at least two weeks before the trial. They never contested its accuracy or introduced any evidence to contradict it.

Appellees' plan with a total deviation of 2.61% thus established that the deviation in the Board Plan of 7.83% was avoidable if an effort had been made to do so.

The Appellant seeks to escape the failure of the Board Plan to achieve practicable equality by a series of defensive arguments. He claims that: (a) the available census data made the deviations in the Plan unavoidable; (b) this Court should establish and apply a *de minimis* rule as a ground for ignoring the deviations; (c) this Court should presume the constitutionality of the Plan in order to shift the burden onto the Appellees to show they were specifically hurt by the deviations; and finally (d) the standard of equality itself should be changed.

All of these arguments are without merit.

D. The 7.8% range of deviation in the Board Plan was avoidable and the available census data did not preclude substantially smaller deviations.

Appellant argues that the average population census units available to the Board was 1,100 persons, and since the deviations of the Plan do not exceed 800 people, the Plan does as well as can be expected. In effect, he is saying that the deviations below the census unit average are "unavoidable".

There is a kind of persuasive appeal to the Appellant's claim: Deviations below "census unit averages" should be acceptable. The Court is spared fixing a definite percentage figure which Appellant is shrewd enough to perceive this Court is reluctant to do. However, the Appellant is really applying the advertising man's trick of obscuring meaning by a technical phrase.

Analysis reveals the speciousness of the Appellant's claim. The census unit average of 1,100 people is arrived at by dividing the population of the state (3,012,170) by the number of census units (2,746). The average has no statistical meaning in itself, because it is too gross a figure. Moreover, the average has no operative utility in the creation of legislative districts. Districts are created by adding census units together. The significant fact is that the total number of census units (2,746) far exceeds the number of districts (151) created by the Plan. The smallest census units thus become the working tools for achieving districts of ideal population. There are a sufficient number of these (165 units being below 200 people and 240 units below 300 people (App. B, Appellant's Brief, pp. 94-95)) to do the job.

In fact, this is precisely what occurred in the creation of the plans by the Board and by the Appellees. The Board achieved a maximum population deviation of 800 persons as opposed to the census average of 1,100. The Appellees sub-

mitted a plan (Appellees' Ex. 23) with a 2.6% range of deviation in which the maximum deviation was 321 people, and all but 4 of the 151 districts had a deviation of 200 people or less.

Moreover, the Appellees' plan does not cut census units which Appellant erroneously claims has to be done to achieve closer equality than the Board's Plan. (See Testimony of Vocelli, Single App. at p. 235).

Thus, the Appellant's census unit average has no significance statistically, and this Court should not give it any legally.

Moreover, speculation about the inaccuracy of the census should not excuse the Plan from approaching equality. All of the reapportionment cases decided in the late 1960's were based upon the 1960 census. The possibility of census error was not considered a justification for the deviations in plans under consideration. Although Justice Fortas, in his separate opinion in the *Kirkpatrick* case, made the point about possible census error, this Court, nevertheless in deciding that case in 1969, invalidated a plan with a range of deviation of 5.9%. The point this Court has made many times is that it must rely on the census material because that is the most accurate information available.

E. The Court has heretofore refused to adopt a *de minimis* rule and should refuse to do so in this case.

Appellant claims that the deviation of 7.83% in this case is *de minimis* and should be ignored by this Court. What is clear from the present state of the law is that there is no *de minimis* approach to variations from equality under the one man, one vote doctrine.[6]

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[6] While there is dicta in *Swann* v. *Adams*, 385 U.S. 440, 444 (1967) to the effect that "*de minimis* deviations are unavoidable", it is apparent that the Court meant that only unavoidable minor deviations arising from the nature of the census information are *de minimis*. This interpretation is consistent with *Kirkpatrick's* subsequent handling of the rule.

In *Kirkpatrick*, the Court specifically rejected a *de minimis* rule which was being urged upon it. The Court said:

> "We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'nearly as practicable standard.'" 394 U.S. at 530.

The refusal to accept a *de minimis* population variance was based on two grounds: (a) there is no non-arbitrary way to pick a cut-off point at which population variances would magically become *de minimis* and (b) once a *de minimis* percentage was established, it would rapidly become the variation from equality that reapportionment authorities would focus upon attaining. *Id.* at p. 531. The Court then reasserted the requirement, enunciated in *Swann*, that the burden is on the State to "justify each variance, no matter how small." *Id.* at p. 531.

The *de minimis* rule would not achieve the finality in the litigation of reapportionment cases which the Appellant claims. If a *de minimis* deviation is not expressed as a fixed percentage, there will still be litigation over what is a *de minimis* deviation, and there will still be litigation at the boundary line. Acceptable minimum deviations simply raise the threshold of the dispute. What will terminate litigation is rejecting an imprecise leeway from equality and insisting upon as precise equality as the census data will allow.[7]

Moreover, the establishment of a *de minimis* rule would cloak the gerrymanderer with presumptive legitimacy within the parameters of the predetermined deviation, permitting him to run his lines all over the reapportionment map, safe

[7] See Dixon, *Democratic Representation: Reapportionment in Law and Politics* (1968): "When given clear mathematical guidelines, few legislatures have failed to accomplish reapportionment" (p. 18).

in the knowledge that he was beyond judicial scrutiny if he stayed below the magic figure.

This Court's refusal to enunciate a *de minimis* rule has had a tremendous influence on forcing lower courts to achieve close equality. In case after case, the district courts cite the absence of a *de minimis* rule as a reason for insisting upon almost precise equality.[8]

The real impact of the adoption of a *de minimis* rule would be to excuse the state from being required to articulate the reasons for the deviations, *Swann* v. *Adams, supra,* 385 U.S. at 443, 445; *Kirkpatrick* v. *Preisler, supra,* 394 U.S. at 530, 531. However, when fundamental civil rights are impaired, such as freedom of speech[9] or religion,[10] this

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[8] *Sims v. Amos* 336 F. Supp. 924 (N.D. Ala. 1972), range of deviation in the house, 2.23% and in the senate, 1.39%; *Kelly* v. *Bumpers,* 340 F. Supp. 568 (E.D. Ark. 1972), range of deviation in the senate, 3.5%; *Skolnick* v. *State Electoral Board of Illinois,* 336 F. Supp. 839 (N.D. Ill. 1971), districts in all plans submitted to the Court varied by less than 1%; *Beens* v. *Erdahl,* 336 F. Supp. 715 (4th Div., Minn. 1972), reversed on other grounds, sub nom. *Sixty-Seventh Minnesota State Senate* v. *Beens,*—U.S.—, 32 L.Ed 2d 1 (1972), range of deviation in the senate, 2.53%, and the house, 3.94%; *Ferrell* v. *Oklahoma,* 339 F. Supp. 73 (W.D. Okla. 1972), deviations were less than 0.5% above and below the ideal, the total variance of the districts being .938%; *Noun* v. *Turner,* 193 N.W. 2d 784 (Iowa 1972), range of deviation in the senate 3.2% and in house 3.8%; *Noun* v. *Turner,* 196 N.W. 2d 209 (Iowa 1972), the final plan adopted by the Court had deviations of 1/11 of 1% for the house and 1/20 of 1% for the senate.

[9] *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958): "Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the state bear the burden of persuasion to show the appellants engaged in criminal speech." See also, *Freedman* v. *Maryland,* 380 U.S. 51 (1964), placing the burden on the state of showing that an allegedly obscene film is an unprotected expression of free speech, and *Blount* v. *Rizzi,* 400 U.S. 410 (1971) prohibiting the post office from barring materials from the mail unless its censor first shows them to be unprotected expression.

[10] In *West Virginia Board of Education* v. *Barnett,* 319 U.S. 624, 639 (1924) the flag salute case, it was held that restrictions

Court has required the state to justify any deviation from the constitutional mandate. The reapportionment cases merely reaffirm the principle that the right to vote is one of those basic freedoms which go to the heart of the political processes that make a free democratic society work and, therefore, any tampering with that right must be justified by those who do so.

No great burden is imposed upon the state to come forward with an explanation when a citizen is deprived of an equally weighted vote. On the other hand, excusing the state from explanation gives the architect of districting a free hand and permits him to pursue any sort of irrational state policy in causing deviations below the established *de minimis* level. Such a rule would give rise to the legitimate question of what has the state to hide and would lower the legitimacy of the electoral process in the eyes of the voters.

F. There is no presumption of constitutionality in one-man, one-vote cases, and none should be adopted here.

Appellant urges this Court to adopt a rule of presumptive constitutionality in this case as a device for blocking further inquiry into the reasons for the deviations and as a device for shifting the burden on the Appellees to prove particularized discrimination. This is a variation on the argument for a *de minimis* rule and should be rejected for the same reasons as rejecting that rule.

However, there are even more fundamental constitutional reasons for rejecting the presumptive constitutionality suggestion.

With respect to that presumption, this Court has recognized the distinction between state action related to regulation of economic or social welfare matters and state action

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on freedom of religion would be allowed only "to prevent grave and immediate danger to interests which the state may lawfully protect".

which infringes upon "basic civil rights of man", *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).[11]

As to the state regulation of economic matters, there is a general presumption of constitutionality which can only be overcome by showing that statutory classification and the different treatment under that classification are based upon real "differences that are reasonably related to the purposes of the act", *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

As to state action which impinges upon the preferred freedoms, once unequal treatment is shown, the presumption of constitutionality is reversed, and the Equal Protection Clause requires the state to offer explanation which will be subject to "strict scrutiny" and will be sustained only upon showing of compelling justification. *Skinner* v. *Oklahoma*, *supra*., p. 541.[12]

The right to vote "being a fundamental political right, because preservative of all rights", *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) is certainly one of these basic civil rights. In *Lucas* v. *Colorado Gen. Assembly*, supra, 377 U.S. at p. 736, this Court equated the constitutional right to an equally weighted vote to the "fundamental rights" of "life, liberty and property", citing *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 638 (1943).

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[11] See McKay, *Political Thickets and Crazy Quilts; Reapportionment and Equal Protection*, 61 Mich. L. R. 645 p. 666-681 (1963).

[12] In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1937), the Court recognized that certain of the freedoms guaranteed by the Bill of Rights enjoyed a special place in the hierarchy of constitutional rights in that they impact directly on our fundamental political processes. Included in these special freedoms are the right to vote, the dissemination of information, the establishment of political organizations and the right of peaceable assembly. Any attempt to alter these basic rights will be subjected "to more exacting judicial scrutiny . . . than are most other types of legislation".

In one man, one vote cases, the population inequality of the districts itself establishes the invidious discrimination violative of the Equal Protection Clause without the challenger of the plan having to prove any further or particularized discrimination.[13]

On the issue of burden of proof, the one man, one vote cases such as *Reynolds*, *Swann* and *Kirkpatrick* are completely distinguishable from the alleged racial discrimination cases arising from multi-member districts typified by *Fortson* v. *Dorsey*, 379 U.S. 433 (1965); *Burns* v. *Richardson*, 384 U.S. 73 (1966); and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

In the latter cases, in every instance, legislative districts were conceded to be of equal population. As a result, these cases did not raise the one man, one vote issue. Rather, the claim was that multi-member districts caused racial discrimination and this Court held that such a claim had to be specifically alleged and proven.

It need hardly be pointed out that were the burden of proof imposed in *Whitcomb* applied to the one man, one vote doctrine, that doctrine would never have reached the point of fruition and achieved the tremendous gains it has.

G. The *Kirkpatrick* rule is applicable to state legislative reapportionment and should not be modified.

Appellant, in an effort to avoid the strict standard of equality required by *Kirkpatrick*, argues that that case should not be applied to state reapportionment or, in the alternative, if it must, that the standard itself should be changed.

Kirkpatrick, involving congressional reapportionment, is premised on Article I, Section 2 of the United States Con-

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[13] See O'Rourke, *Reapportionment: Law, Politics, Computers* op. cit., p. 28.

titution. The applicable constitutional provision, however, is not a reason for refusing to apply *Kirkpatrick* to state reapportionment cases which are, of course, premised upon the Equal Protection Clause of the Fourteenth Amendment. Both congressional and state reapportionments raise precisely the same central issue: the right of an individual to an equally weighted vote. The issue being the same, the standard of equality should also be the same. There is just no intellectual or practical reason for making the distinction between them.

The *Kirkpatrick* rule has been applied by both federal and state courts in many state legislative reapportionment cases since 1969.[14] As will be shown below, it has achieved extraordinary success.

The only reason advanced by the Appellant for urging this Court to abandon *Kirkpatrick* is that the tightness of the *Kirkpatrick* standard of equality encourages gerrymandering. The short answer is the one given pungently by Justice Brennan in *Kirkpatrick* (at p. 534) that opportunity for gerrymandering is even greater when the districts are unequal.

H. The strongest argument in favor of the standard of practicable equality is that it has worked to achieve equal legislative districts in a majority of the states throughout the country.

The test of a legal principle is whether or not it achieves its purpose. As indicated above, the one man, one vote doctrine asserts the constitutional right of each citizen to an equally weighted vote.

Although the standard of practicable equality was expressed in *Reynolds* in 1964, it was done with a certain diffidence and seemed to leave open loopholes to avoid com-

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[14] See cases cited in footnote 8 supra. The New York Court of Appeals recently said in *In the Matter of Schwartz* v. *Rockefeller*,——N.Y. 2d—— (Ct. of Appeals, decided Dec. 29, 1972): "Indeed, we are of the opinion that the standards for state legislative and congressional apportionment are substantially the same." (Unreported Memo of Dec., p. 4).

pliance. That same standard, when expressed in *Kirkpatrick,* indicated this Court meant it and was going to insist upon compliance. This Court noted in that case that ". . . a state legislature which tries, can achieve almost complete numerical equality among all of the state's districts." *Kirkpatrick,* p. 532.

It is fascinating to compare the ranges of deviations[15] approved by the courts and established by reapportionment authorities in the period prior to *Kirkpatrick* with the period after *Kirkpatrick.*

From 1964 to 1969, the lower courts often approved deviations in legislative reapportionment cases in a range of over 15%. Typical of these cases are the following:

	Range of Deviation:
Stout v. *Bottorff,* 249 F. Supp. 488, 494 (S.D. Ind., Indianapolis Div. 1965)	23.99% Senate 23.51% House
Nolan v. *Rhodes,* 251 F. Supp. 584 (S.D. Ohio E.D. 1965) ..	30.00%
League of Nebraska Municipalities v. *Marsh,* 253 F. Supp. 27 (D. Neb. 1966)	19.65%
Dungan v. *Sawyer,* 253 F. Supp. 352 (D. Nev. 1966)	21.2% Senate 22.4% House
Banister v. *Davis,* 263 F. Supp. 202 (E.D. La. 1966)	15.00%
Toombs v. *Fortson,* 277 F. Supp. 821 (N.D. Ga., Atlanta Div. 1967 ..	20.00%

[15] Range of deviation, as used here, is defined in footnote 5 supra; i.e. the *sum* of the percentage differences from equality of the largest and smallest districts.

The lower court decisions were reflected in the range of deviations of plans adopted by all the states prior to 1969. The following chart [16] indicates the range in that period:

Deviations Prior to 1969:

Range of Deviation:	*Number of States:*	*Percentage of States:*
	Senate:	
Under 1%	0	0%
1-5%	1	2%
5-10%	2	4%
10-15%	3	6%
Over 15%	44	88%
	House:	
Under 1%	0	0%
1-5%	1	2%
5-10%	0	0%
10-15%	1	2%
Over 15%	48	96%

Thus, prior to 1969, only 2% of the states had a deviational range for either their senate or their house within the 1-5% bracket and 88% of the states for the senate and 96% of the states for the house had deviational ranges of over 15%.

After the *Kirkpatrick* decision in 1969, the situation almost instantaneously changed. The decisions of the lower courts in almost all cases applied *Kirkpatrick*, specifically stated that there was no *de minimis* rule and held that, except when adequate justification was shown, deviations

[16] This chart is compiled from the table entitled "Apportionment of Legislatures" printed in Council of State Governments, "The Book of States: 1968-1969" Vol. XVII pp. 66-67.

were to be allowed only if unavoidable. Typical of the cases decided during the 1970's are the following:

	Range of Deviation:
Sims v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972)	1.39% Senate 2.23% House
Kelley v. *Bumpers*, 340 F. Supp. 568 (E.D. Ark. W.D. 1972) ..	3.5% Senate
Beens v. *Erdahl*, 336 F. Supp. 715 (4th Div., Minn. 1972), rev. on other grounds, sub nom., *Sixty-Seventh Minn. State Senate* v. *Beens*, — U.S. —, 32 L. Ed. 2d 1 (1972)	2.53% Senate 3.94% House
Ferrell v. *Oklahoma*, 339 F. Supp. 73 (W.D. Okla. 1972)	0.05% Senate
Noun v. *Turner*, 193 N.W. 2d 784 (Iowa, 1972)	3.8% House 3.2% Senate
Noun v. *Turner*, 196 N.W. 2d 209 (Iowa, 1972) Final Plan ..	1/11 of 1% House 1/20 of 1% Senate
In the Matter of Schwartz v. *Rockefeller*, — N.Y. 2d — (Ct. of Appeals, decided December 29, 1972	1.8% Senate 3.38% House

The lower court decisions are similarly reflected in the range of deviations in reapportionment plans adopted throughout the country since 1971. The following chart indicates the range of deviation after 1970:[17]

[17] This chart is compiled from a pre-publication draft of a document prepared by Council of State Governments entitled "Reapportionment in the Seventies" to be published in January 1973. As of the date of preparation of this document the Council of State Governments had information as to 45 states with respect to the senate and 42 states with respect to the house, which had adopted reapportionment plans since 1970.

Deviations after 1970:

Range of Deviation:	*Number of States*:	*Percentage of States*:
	Senate:	
Under 1%	3	6.7%
1-5%	21	46.7%
5-10%	8	17.8%
10-15%	5	11.1%
Over 15%	8	17.8%
	House:	
Under 1%	4	9.5%
1-5%	16	38.1%
5-10%	8	19.1%
10-15%	4	9.5%
Over 15%	10	23.8%

Thus, while prior to 1970, only 2% of the states had a deviational range in the 1-5% bracket, after 1970, 53.4% of the states have achieved that deviational range for their senate and 47.6% for their house. Likewise, while prior to 1971, 88% of the states for the senate and 96% of the states for the house had deviational ranges of over 15%, after 1971, only 17% of the states for the senate and 23.8% of the states for the house have deviations in excess of 15%.

This is a dramatic result. It is the total answer to the pundits, including the Appellant in his brief, who have criticized this Court for an over-insistence upon equality.

Of little moment to this Court is that its critics have been proven wrong. Of great significance to this Court and to the nation is that the one man, one vote doctrine is achieving its purpose of guaranteeing to our citizens an equally weighted vote. This Court, by leading that movement, has fulfilled its most honored role of protecting and enhancing the basic civil rights of man.

After this extraordinary record of success, it is inconceivable that this Court would relax the standard of practicable equality and thereby stop or reverse the progress achieved.

An affirmance in this case will assure continuation of that progress.

II. The District Court properly found as a matter of fact that political structuring caused deviations in the plan and properly held as a matter of law that political structuring is not an acceptable justification for population deviations.

A. The requirement that deviations be justified.

Appellees submitted a reapportionment plan for the House with a range of deviation of 2.61%, compared with the Board Plan range of deviation of 7.83%. Appellees' plan was recognized as accurate and valid by the District Court.[18] Under such circumstances this Court, in *Swann* and in *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967) made it clear that the state has the duty to articulate acceptable reasons for variations among the population of the legislative districts in the challenged plan.

Kirkpatrick limited the state policies which might justify deviations and increased the duty of explanation by mandating that ". . . the State must justify each variance, no matter how small" (p. 531).

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[18] Court acceptance of the validity of Appellees' alternative plan is significant because it guards against the situation where the submission of any plan imposes a duty of explanation on the state. Appellant had the opportunity at the trial to challenge Appellees' plan. He chose not to do so and thereby conceded it to be accurate.

B. The District Court properly found that political structuring caused the deviations in the plan.

The Board did not simply refer to past election returns for the purpose of informing itself as to the possible political outcome of the Plan. Nor did it use this information as a corollary check on other factors. The Board pervasively applied prior election results and other political information to engineer and maneuver the district lines in order to achieve a desired political result. Political structuring was the dominant operating principle employed by the Board.[19]

Judge Saden, a member of the reapportionment Board, testified that he applied past election results in the creation of each and every district throughout the state.[20]

Likewise, Mr. Collins, his assistant and primary draftsman of the Plan, testified that political considerations were applied in the formation of assembly districts throughout the entire state.[21]

Judge Saden, in fact, went even further and testified that his understanding of the one man, one vote doctrine *re-*

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[19] Appellant characterizes the Board's shaping of districts for political ends as the application of a "political fairness principle". Such a pleasant sounding phrase is, of course, the classic trick of the advertising man. It not only hides reality; it endeavors by repeated assertion of the slogan, to substitute the slogan for reality. As will be shown, infra. pp. 51-54, the Board Plan was anything but "fair".

[20] Judge Saden testified: "Q. And did you in fact plug in the election results for all three years, '66, '68 and '70 into *each and every newly created senate district and house district?* (emphasis added) A. I did as far as you could . . ." Saden Dep., Single App. p. 67).

[21] Mr. Collins testified: "Q. So that political consideration then did go into the formation of Assembly Districts 18, 19 and 20? A. Absolutely. Absolutely. *Throughout the state this was true.*" Collins Dep., Single App. p. 101. (emphasis added).

quired that he adopt political structuring to carry out the true meaning of that doctrine.[22]

Respect for the preservation of towns played a minor role in the development of the Plan. Judge Parsky, another member of the reapportionment Board, testified that the operating principle of the Board was: "that once town lines were cut, from then on it didn't make any difference."[23]

Likewise, Mr. Vocelli, who worked for the Board, also testified that he had "the impression that once it became clear and obvious, there would be some violation of the state prohibition against town cuts, I got the impression that after that, concern about the integrity of the town lines diminished to virtually nothing" (Single App., p. 240).

Moreover, Plaintiffs' Exhibit 20 (Single App., p. 178) revealed that even at the Plan's deviational range, fewer town lines could be cut and cut a fewer number of times—i.e. 36 towns rather than 47 under the Plan and 49 segments of towns rather than 78 under the Plan.

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[22] Judge Saden testified: "'. . . if you concede as you must, the one-man, one-vote principle is one to create an equal protection of the law is a just result for every man's vote it seems to me that a corollary to that, as I explained to you before, is the proposition that if you don't get some kind—if you don't make any effort to get some kind of equal representation in the General Assembly in both Houses based upon the kind of total vote you are getting for those Houses you are thereby to that extent depriving the efficacy of that one-man, one-vote principle because you're denying minority groups as full a voice as they would otherwise be entitled to." (Saden Dep., Single App., p. 77)

[23] His exact testimony was: "Q. Was there a fundamental working principle, even if it hadn't been discussed, on the basis of how you dealt with the cutting of town lines in order to comply with the Federal constitutional requirements? A. Well, yes. The impression I had was that the operating principle was that once the town lines were cut, from then on it didn't make any difference" (Trial Transc., Single App., p. 187).

It is thus apparent that political structuring was the dominant policy consideration of the Board and played a major part in every one of its decisions with respect to the location of district lines.

Consequently, the District Court properly found as a fact that "the partisan political structuring . . . was a substantial cause of the numerical deviations of the Board Plan here[24] and that "If partisan political balancing were eliminated as a factor, a closer approach to perfect equality could be achieved with the materials at hand (see Plaintiffs' Ex. 23)."[25] The finding of the lower court, which heard the evidence, and was best able to weigh and evaluate it, should not be disturbed.[26]

C. Political structuring is not an acceptable justification for the deviations.

The District Court held that "political gerrymandering [as practiced by the Board] cannot be approved as a legitimate reason for violating the requirement of numerical equality of population in districts. . . . No legislative or constitutional enactment provides any basis for it or authorizes it. No compelling state necessity for it is demonstrated. The Supreme Court plainly would not approve the partisan political structuring which was a substantial cause of the numerical deviations of the Board plan here."[27]

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[24] Memo of Dec., op. cit. at p. 11a.

[25] Id. at p. 7a. Plaintiffs' Ex. 23 is the House Plan with a 2.16% deviation abstracted in the Single App. at p. 181.

[26] Since the trial court could properly have found, based on the evidence, that preservation of towns did not cause the Plan's deviations, Appellant's argument in his brief that political structuring did not cause the deviations avails him little. There would then be no explanation for them, and the Plan would be invalid under this Court's rule in *Swann* and *Kirkpatrick* that justification for the deviation was required.

[27] Memo of Dec., op. cit. pp. 10a, 11a.

In so holding the lower court was following this Court's precise ruling in *Kirkpatrick*, and its necessary implication in *Ely* v. *Klahr*, 403 U.S. 108 (1971).

1. Bi-partisan cooperation and the necessity for political compromise do not excuse unequal districts.

The political party interplay inherent in the political structuring employed by the Board is similar to the "legislative interplay" and "reasonable legislative compromise" the appellants in *Kirkpatrick* argued should justify the deviations in that case. The *Kirkpatrick* appellants further urged this Court to remember that "practical political problems" are inherent in the enactment of reapportionment plans.

However, this Court denied that they were justifications for avoidable deviations. Justice Brennan agreed with the lower court that the rule was one of "practicality" rather than "political practicality", and went on to answer the question now before us by stating: "Problems created by *partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.*" (*Kirkpatrick*, p. 533, emphasis added).

Likewise in *Paulson v. Meier*, 246 F. Supp. 36 (D.N.D., 1965), one of the grounds the district court used to reject a plan was that there appeared to be no rational design to justify the disparities other than to secure passage of the reapportionment act.

Appellant here claims that political structuring justified the deviations because the Board's purpose was to prevent partisan political gerrymandering. In a like vein, the *Kirkpatrick* appellants sought to excuse deviations on the ground that the preservation of county lines was a means of minimizing the opportunities of partisan gerrymandering. This Court responded: "But an argument that deviations from equality are justified in order to inhibit legislators from en-

gaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparties" (*Kirkpatrick*, p. 534).

Ely v. *Klahr*, supra, presented the situation of political parties in Arizona devising legislative districts by the use of computers that took into account, among other factors, each party's political strength in geographic areas of the state. The lower court had held: "In addition, we disapprove as *inapposite* the consideration of party strength as a factor in reapportionment or redistricting" (*Klahr* v. *Williams*, 313 F. Supp. 48, 152 (D. Ariz. 1970) (emphasis added). This Court, in affirming, noted with approval the lower court finding that party strength was "inapposite"—i.e. that it was irrelevant and inappropriate in the creation of a plan.

In *Noun* v. *Turner*, 193 N.W. 2d 784 (Iowa 1972), the Iowa Supreme Court rejected a plan consciously designed to achieve a predetermined political result similar to the political balancing objective of the Plan before this Court.

What all these cases are saying is that the courts recognize that reapportionment is carried out in a political atmosphere and that every plan has political implications. However, the political factors should not be allowed "to predominate over the requirements of practicable equality" *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C, 1966) aff'd, 383 U.S. 831 (1966).[28]

The underlying policy consideration for rejecting political structuring as a justification for population deviation is that it is too easy "an escape hatch for the reluctant" *Preisler* v. *Sec. of State of Missouri*, 257 F. Supp. 953, 970

[28] Judge Caleb N. Wright, dissenting in *Sincock* v. *Gately*, 262 F. Supp. 739, 858 (D. Del. 1967) said "To concentrate on the political affiliations of the citizenry in drafting a scheme of reapportionment is to employ an impermissable standard."

(W.D. Mo., Cent. Div. 1966) and too open "an avenue of subterfuge" (*Kirkpatrick* at p. 535). The political factors always being present in the reapportionment process, they can always be paraded out to excuse any deviation. To allow these political factors to be a justification for population deviation in a plan would destroy the one-man, one-vote doctrine.

Appellant argues that because the political structuring employed by the Board was bi-partisan, it should be more acceptable to this Court. As will be shown below, (*infra*, pp. 51-54) the Board did not operate, in fact, in a bi-partisan manner. But assuming *arguendo*, it did, bi-partisanship alone does not justify the deviations flowing from political structuring.

Both political parties united in creating the plans which were rejected by this Court in *Ely* v. *Klahr, supra,* and by the Iowa Supreme Court in *Noun* v. *Turner, supra.* Joint cooperative efforts by the political parties do not excuse unequal districts. The individual voter denied an equally weighted vote is no better off because of the number of political parties who participated in depriving him of his constitutional right, even if one of those political parties were his own.

The Appellant also argues that Article Third, Section 6 of the Connecticut State Constitution, which establishes a procedure for reapportionment requiring the concensus of both political parties, authorizes, and even necessitates, the Board's policy of endeavoring to proportionalize political party representation. The argument is ingenuous but specious. There is no logical link between the mechanical and institutional process of reapportionment, and the policies and principles that a reapportionment body must follow to do its job. Surely, the argument could not be turned around, and, if the Board had not utilized the proportional representation method it did, appellees could argue before a state court that the Board had violated Article Third, Section 6 of the State Constitution.

Moreover, the intent of the State Constitution is more accurately discernible by its words than by general analogy. Article Third, Sections 3 and 4 provide for single member senate and assembly districts. The proportional representation principle adopted by the Board, flies in the face of these specific provisions of the Connecticut Constitution. The system of single member representation is subverted when a legislative districting plan is designed to elect legislators on the basis of a state-wide formula reflecting the total state-wide vote of each political party.[29]

2. "Fair" representation, not being susceptible of definable standards or of objective testing, should not be allowed as an excuse for inequality.

Appellant argues that political structuring employed by the Board is entitled to special preference because the avowed purpose was to achieve "fair" representation by both the political parties.

There are a number of reasons why this claim should be rejected:

(a) There is no way to test before an election whether or not the Board lived up to its assertion of fairness. In the political gerrymandering cases, the courts have indicated that it is pure speculation to guess at the outcome of a future election, and it is "unrealistic" to project the results of past elections because they are only an indication of voters' reaction to a particular candidate at that time (*Wells* v.

[29] It is worth observing that proportional representation has never been used for the election of a state legislature in the country. Although it was used in the election of city councils in 22 cities between 1915 and 1948, after it was rejected in New York City in 1947, it was repealed throughout the country, except in Cambridge, Mass. Silva, *Relation of Representation and Party System to the Number of Seats Appertaining to a Legislative District*. 17 West. Pol. Q. 742 at p. 759 (1964).

Rockefeller, 311 F. Supp. 48, 51 (S.D.N.Y. 1970).[30] Requiring that citizens be subjected to an election under a plan before they can challenge whether or not it is unconstitutional, is itself unfair.

(b) If "fairness" can be tested by an election, then based upon the 1972 election in which the Plan was used, it was unfair. It revealed a significant bias in favor of the Republican Party.

In the 1972 Connecticut senate races, the Republicans received a state-wide total of 724,471 votes or 54.18% of the vote and elected 63.88% of the senators (23 out of 36). Democrats in the senate polled 611,186 votes, or 45.71% of the vote and elected 36.12% (13 out of 36). In the races for the Connecticut House of Representatives, the Republicans polled 705,878 votes or 52.88% of the vote and elected 61.59% of the members of the lower house (93 out of 151). The Democrats polled 625,499 votes or 46.86% of the vote and elected 38.41% of the representatives (58 out of 151).[31]

These results are to be compared with the results of the 1970 election under the pre-Board Plan. For the House, the results are somewhat muddied by the fact that a number of candidates ran unopposed. However, as to the Senate, the Democratic candidates in 1970 polled 518,726 votes, and the Republican candidates 536,555 votes. The Democrats elected 19 senators and the Republicans, 17. The Democrats thus got 49.15% of the vote and elected 52.77% of the senators. The disparity between the proportion of party state-wide vote and proportion of party candidates elected under the politically unstructured pre-Board Plan

[30] Speculation as to election results is particularly unreliable when district lines are changed and there is no track record for the new districts.

[31] *Statement of Vote*, General Election, November 7, 1972, published by the State of Connecticut.

was 3.6%. Under the so-called "fair" Board Plan, it is 9.0%.[32]

(c) If one election is not an accurate test of the "fairness" of the Plan, then how many elections are required? Obviously there are only five elections for the legislature in each decade. If the Plan must be tested by several, since reapportionment cases take almost a year to be tried and appealed, then the deviations caused by political structuring, for all practical purposes, would be immune from justification, and a plan which is the product of political structuring could regularly win by default.

(d) Fairness not only cannot be tested, it cannot even be defined. What is the requisite proximity between the percentage of the party's total state-wide vote and the percentage of the number of candidates it elects? If a party gets 52% of the vote, is it fair if it elects 50% of its candidates?—40% of its candidates?—35% of its candidates? The Court is pushed into a numbers game without any rules at all.

(e) From the foregoing, it is apparent political fairness has no standard by which to measure it and offers no objective way to test it.[33] The Court is thus left with nothing more than the word of the reapportioning authorities, or of their proponents, that their plan is "fair". Viewed in this light, the claim of "political fairness" as an excuse for fail-

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[32] This result not only indicates that the Plan was unfair, but it reveals that the Board never had the objective of seeking fairness at all and that the Plan was deliberately designed to create a bias in favor of the Republican Party. Significantly, 1972 registration figures reveal that registered Democrats in Connecticut outnumber registered Republicans by 135,000. Consequently, any deliberate attempt at juggling district lines was obviously aimed at obliterating this registration plurality by maximizing Republican votes in given districts.

[33] Professor Irwin has noted: "It would be hard to imagine an adjective more imprecise and political in nature than 'fair'." Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 Mich. L.R. 729, 752 (1969).

ing to achieve equality is essentialy no different than the excuse of "practical politics". Both of them are simply too wide an avenue for subterfuge, and if allowed as the justification for population deviations in a reapportionment plan, would impose no restraints on those deviations.

3. Focusing upon representation as a division of power in the legislature between the political parties leads the Court into political questions which are judicially unmanageable.

Trying to achieve fair representation of the political parties in one-man, one-vote cases, is like trying to assure funds for secular education in the public aid to parochial school cases. The very attempt "entangles" [34] the Court in religious affairs in one group of cases and in political affairs in the other. Both are issues this Court has sought to avoid.

Representation involves the matter of the division of political power between the political parties in the legislature resulting from an election. Professor Irwin has wisely said: "Representation is the substance of the political process. It *is* the political thicket." [35] The thorny issues it raises meets one of the criteria of a "political question"—that is, a "lack of judicially discoverable and manageable standards" *Baker* v. *Carr*, 269, U.S. 189, 217 (1962). There is still vitality in the policy of the Court's restraining itself from dealing with such questions.

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[34] *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). Appellants misinterprets the Court's use of the phrase "effective representation" in *Reynolds*. As used in that case the quality of representation clearly related to an especially weighted vote. It certainly did not relate to proportionalization of political party strength.

[35] Irwin, op. cit., 67 Mich. L.R. 729, 748 (1969). This article contains an excellent discussion of the distinction between the constitutional questions raised by issues of the equally weighted vote and representation. It points out the dangers of the courts' trying to resolve problems associated with representation.

This Court has succeeded in one-man, one-vote cases because it has decided only the objective constitutional issues of equal suffrage. If it allows a political fairness principle to justify deviations from equality, it will both lose itself in the political morass and lose the success it has gained.

III. Political structuring is founded upon an irrational premise and has irrational and pernicious consequences which not only disqualify it as a justification for the deviations in the plan but also its pervasive use causes invalidation of the plan itself.

The alleged aim of the political structuring principle used by the Board was to proportionalize each party's strength in the legislature on the basis of the total state-wide vote received by all of each party's candidates in the district elections. The presumption is that the state-wide total of the votes for all of a party's candidates running in individual districts has some meaning. In fact, that total has no meaning at all.

Whereas, a state-wide candidate runs as a party candidate in all the districts and wins on the basis of the state-wide vote, legislators run as party candidates only in each individual district and win on the basis of the vote in each district. The races in each of these individual districts are disparate.[36] Party affiliations in district elections are of small significance and, if we are to believe the political scientists, they are becoming less important. District elections are more likely determined by the different personalities and the varying personal popularity of the individual candidates, by the factor of incumbency, by campaign organization and finances and by completely local issues such as the prospect of low-income housing being brought into a town; sex education in the schools; or a local tax problem. Adding up votes cast for all of each party's candidates in

[36] An illustration on the national scale is the recent landslide victory of President Nixon when compared with his party's inability to win a majority in local congressional races.

these different district races is like adding up apples, hockey sticks and yellow cadillacs. That state-wide total is not a rational number.

Using that irrational number as a basis for proportionalizing parties' strength, renders the Board's political balancing principle an irrational standard.

The use of an arbitrary, capricious or irrational standard as a basis for classification or making distinctions between citizens is itself a violation of the Equal Protection Clause.[37]

Since the political balance principle is itself irrational, its pervasive use in the development of the Plan inevitably had irrational results. Among them were bizarrely shaped districts, unnecessary fragmenting of town lines and arbitrarily created safe districts.

In addition, the whole attempt to structure districts to achieve particular political ends rendered the Plan a gigantic gerrymander. If this Court validates the Board's methods, it will have the consequences of sanctifying a mutilation of legislative districts in other states and of authorizing other more effective methods for manipulating the outcome of elections.

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[37] This Court said in *Avery* v. *Midland County, Texas*, 390 U.S. 474 (1968) at 484: "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious.' In *Burns* v. *Swenson*, 430 F.2d 771, 778 (8th Cir., 1970) which involved a claim of denial of equal protection when a recalcitrant prisoner was placed in maximum security, the 8th Circuit Court said the essential element to an equal protection challenge is: "The alleged invidious discrimination must be against one person in favor of another *person* or *class of persons* with *no rational basis* of differentiation in treatment (emphasis added). See also, *McDonald* v. *Board of Election*, 394 U.S. 802, 809 (1969) and *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

These results and consequences clearly disqualify political structuring as a justification for the deviations in the Plan. Their total impact so perverts the salutary purpose of equality implicit in the one man, one vote doctrine and makes such a mockery of the franchise as to warrant invalidating the Plan itself.

A. The peculiarly shaped districts as an evidence of irrationality.

The District Court found that the political structuring "method used resulted in creating some districts with highly irregular and bizarre outlines" (Memo. of Dec., op. cit. p. 7a). Since the lower court is familiar with the local political terrain, its finding on this issue is entitled to great weight.

Inevitably when the excess plurality of a party in one area of the state becomes a justification for maneuvering to elect that party's candidates in another area of the state, the district lines must wiggle and joggle to ferret out pockets of that party's strength. Judge Saden freely admitted this is precisely what happened in the development of the Board plan. He testified at the trial as follows:

> "Q. (By Judge Blumenfeld) In applying this corollary to the doctrine of fairness, is that what caused some of these districts to come out in what have been described as unusual shapes or shapes that deviate from normal? A. In some instances, that may have occurred" (Single App., p. 265).

Even legislative districts which were compact, rational and within town lines were required to be fragmented by the inexorable operation of the principle. Judge Saden himself conceded as much when he said each individual district could not be considered piecemeal no matter how fair it may

be by itself but must be considered only in the context of how it fitted into the overall political balance principle.[38]

Political structuring accounted for the strained contiguity in the ninth senatorial district of the Towns of Farmington and Newington which were connected by an empty swamp, 1,000 feet in length (See Appellees' Ex. 24 A-E and 25 A-E). It also caused[39] the grotesque, almost Rorschach shapes of many of the districts demonstrated in Appellees' Exhibit 19 (Single App. pp. 153-177). Appellees introduced exhibits which proved that by following town and census tract boundaries and disregarding political objectives, much more rational designs for many of these districts could be achieved.[40]

Bizarrely shaped and geographically peculiar districts are easy to spot and hard to justify. Indeed, recognizing grotesque and bizarre voting districts is similar to the pragmatic recognition of hard-core pornography enunciated by Justice Stewart in *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964): ". . . perhaps I could never succeed in intelligibly

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[38] Judge Saden testified as follows: "Q. In deciding to add a portion of another town or a segment of another town did you in each case look to the election results for those contiguous towns to determine which segment you were going to add? A. I gave consideration to that factor as a factor in testing the whole area and in trying to reach an overall fair plan. *I mean, you can't just take these things piecemeal* and say, 'Well, forget everything else and *just take this one little district here and is that a good fair district the way it is drawn?*' . . ." (Single App. p. 218-224) (emphasis added).

[39] Mr. Collins testified: "Q. Well, does not, however, Plaintiff's Exhibit E1 illustrate that census data alone was not the cause for all of the turns and twists that appear in the board plan? A. I never said that it was. Q. It was the political consideration? A. Absolutely. Absolutely. I don't think anybody is denying this or should. (Single App. p. 100)

[40] See Appellees' Exhibits 9 through 18 on file with the clerk which are not printed in the appendix under Rule 38 of this Court. See also the testimony of Mr. Vocelli, Single App. pp. 212-226.

[defining it]. But I know it when I see it. . . ." Even a cursory examination of the House and Senate Districts contained in the Appellees' Exhibit 19 (Single Appendix, pp. 152-177) quickly reveals the lengths to which the Board went in imaginative gerrymandering.

Individual citizens residing in the mutilated districts are sacrificed to the over-all objective of political balance. They become like Rosencrantz and Guildenstern in *Hamlet*, innocent victims of the machinations of those in power.

The District Court below held that these peculiar shapes were indications that "impermissable purposes rather than compelling state interest had caused deviations from equality".[41]

The irrationality of the districts can also justify invalidating the Plan itself.

In *Reynolds* at Page 567, this Court described the districts in that case as "little more than crazy quilts, completely lacking in rationality and could be found invalid on that basis alone."

In *Drum* v. *Seawell*, 250 F. Supp. 922, 925 (M.D. N.C. 1966) aff'd 383 U.S. 831 (1966), the district court held that "compactness and contiguity are aspects of practicable equality" and that the "tortuous lines which delineate the district boundaries" and the "resulting lack of compactness and contiguity" were grounds for declaring the plan constitutionally invalid.

Judge Canella, dissenting in *Wells* v. *Rockefeller*, 311 F. Supp. 48 57 (S.D. N.Y. 1970) relied upon this Court's reference to "crazy quilts" in the *Reynolds* case to state that "wild district configurations are not constitutionally acceptable".

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[41] Memo of Dec., op. cit., p. 7a.

In *Paulson* v. *Meier* 246 F. Supp. 36 (D.N.D. 1965) the Court took great pains to describe a particularly oddly shaped district in order to demonstrate the lack of rationality as a ground for condemning the Plan.

While recognizing that this Court has never thrown out a plan on the basis of lack of compactness of the districts, nevertheless, Appellees urge that this is an appropriate case to so hold when the irrationally shaped districts are the consequence of the pervasive application of an irrational standard in the development of the Plan.

B. Irrational fragmenting of towns.

The lower court found that "If partisan political balancing were eliminated as a factor . . . fewer towns could be cut" (Memo. of Dec., id, p. 7a).

The evidence in this case is clear that the towns were fragmented not to achieve a closer approximation to equality but to effectuate the Plan's political structuring principle.

Both Judge Saden and Mr. Collins testified that when there was a choice in the development of assembly districts between preserving town lines and achieving their notion of political balance, they always chose the second objective.[42] In fact, Judge Saden specifically stated: ". . . It is far more important to have a fair plan than to preserve a town line . . ." (Single App. p. 47) and "where there are other considerations of fairness . . . I did not insist town lines be maintained exact" (Single App. p. 56).

As illustrative of the Board's practice of unnecessarily or excessively dividing towns solely for political reasons, appellees adduced evidence of specific examples of cutting the Towns of Killingly, Watertown, Montville, Hamden and

[42] See Collins Dep., Single App. p. 96; Saden Dep., Single App. pp. 47, 53.

North Haven.[43] Further, specific examples were unnecessary when the authors of the Plan readily conceded political structuring caused and justified the town cuts.

Plaintiffs' Exhibit 20 (Single App. p. 178) proved that by keeping within the Plan's deviational limits, only 36 (as opposed to the Plan's 47) towns had to be cut, and only 49 (as opposed to the Plan's 78) segments had to be created. This was a significant preservation of town structure.

Dividing towns in order to achieve population equality is constitutionally necessary. However, fragmenting towns for any other reason is irrational. The individual citizen expects that legislative districts will follow town lines and attaches an appropriateness to such congruency. To him, the unnecessary splintering of towns in the formation of districts is clearer evidence of the Plan's arbitrariness than the peculiarly shaped districts. On the basis of either evidence of irrationality, the Plan should be invalidated.[44]

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[43] See Appellees' Exhibits 5, 5-A, 6, 6-A, 7, 7-A and Collins and Saden Depositions in Single App. at pp. 42-56 and 96-98.

[44] The Connecticut Supreme Court in *Miller* v. *Schaffer* (Reported in the Connecticut Law Journal, Vol. XXXIV, No. 23, December 5, 1972) at Page 1) held that the Plan was valid for interim use for the November, 1972 election. Although that court indicated that town lines were not cut in violation of the State Constitution, it is significant that the court never mentioned the Board's political structuring policy. The entire record of the federal case appealed to this Court, including all the exhibits, depositions, and trial transcript, was entered as an exhibit in the state case and constituted over 90% of the record of the state case. The state court was asked by the same attorneys who represent the Appellant in this case to refrain from deciding any federal question. Obviously, it considered that political structuring raised a federal issue which it deliberately refrained from deciding. As a result, the assertion here made that political structuring caused the irrational fragmenting of town lines and violated the standard of practicable equality referred to in *Drum* v. *Seawell, supra,* was not decided or considered by the state court.

C. The arbitrary creation of safe districts.

For the political structuring principle to work and in order to achieve the intended relationship between the total party vote and assured election of the requisite number of the candidates of each party, the legislative districts must be made as safe as possible.

The evidence in this case establishes that creating safe districts was an objective of the Board.

Swing senatorial districts were changed into safe districts. Mrs. Osborn testified at the trial that Senatorial District 18 prior to the Plan had been a swing district in which, in the three elections of 1966, 1968 and 1970, the margin of victory had been a few hundred votes out of a population of over 85,000. However, by the Plan deliberately removing the Democratic Town of Griswold and adding a Republican portion of Norwich, the senatorial district became solidly Republican (Single App. pp. 257-260) and in fact, in the 1972 election, this district went Republican by 8,200 votes.[45]

The creation of safe districts sacrifices the individual voter to political party objectives. The lower court properly recognized this consequence when it stated:

> "It is arguably unfair to individual voters and potential candidates for political office to find themselves locked into districts deliberately structured to be 'safe districts' for a party they oppose."

Safe districts moreover create the kind of "fiefdom" decried by Justices Douglas and Black in *Ely* v. *Klahr*, supra at p. 118.

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[45] See *Statement of Vote, General Election*, November 7, 1972, published by the State of Connecticut.

It is no answer, as Appellant claims, that safe districts often result from residential patterns. Natural political groupings may occur as a result of people moving on their own volition into district of known political predilictions. It is quite another thing to superimpose artifically and arbitrarily a predetermined political grid work over these natural groupings in order to achieve a politically structured result on a statewide basis.

D. The plan as a gigantic gerrymander.

The one fact that smashes one in the face about this case is that the Plan is a politically saturated document. Every district line has been dictated by a desire to achieve the prescribed political purpose—a proportionalization of the strength of each political party.

Normally, proof of political purpose in reapportionment cases is hard to come by. Here, it is not only offered but it is shouted. It is even proclaimed as the crowning virtue of the Plan. Normally, gerrymandering is confined to a few districts in a reapportionment scheme. Here, the political structuring contaminates every district in the entire state.

Appellees contend that the Plan has a built-in bias in favor of the Republican Party, and the use of the Plan in the 1972 election proved it. But whether or not that election is sufficient proof, the Board's practice of maneuvering district lines for political purposes meets the definition of gerrymandering.[46]

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[46] Justice Fortas in *Kirkpatrick* (p. 538), defined gerrymandering as "the deliberate and arbitrary distortion of district lines and population for partisan or personal political purposes". See also Edwards, *The Gerrymander and 'One-Man, One-Vote'* '46 N.Y.U. Law Rev. 779, Nov. 1971.

The political structuring here applied overrode every consideration which traditionally characterizes a sound reapportionment plan: equality in population of the districts, rational shapes of the districts and preservation of town boundaries. Nothing was safe before the inexorable application of the Board's fanatical principle.

Judge Saden tells us that the Plan was intended to be "fair" and Appellant dins it in our ears. But we cannot define fairness or test it, and we do not know whether or not we received it. All we are sure we have is the sound of the advertising man's slogans, and experience tells us that these slogans are inaccurate descriptions of reality.

The Board's political structuring method of proportionalizing political parties' strength on the basis of state-wide vote in the district elections is a dangerous national precedent if allowed in states where there is a non-congruency between a political party's strength and the population spread.[47] Consider a state with one large city in which the Democratic Party candidates win elections by large pluralities (Colorado with Denver; Minnesota with Minneapolis-St. Paul; Missouri with Kansas City, come readily to mind). If, in order to keep the proper proportion between total state-wide party vote and party candidates elected, these large city pluralities must be utilized to elect Democratic candidates in other areas of the states, the opportunity, even the necessity, for mutilation of district lines is boundless.

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[47] This accounts for the peculiarly shaped districts in the Plan. In Connecticut, Fairfield County comprises about 13% of the land area (611 square miles out of 5009) and in 1970, it produced about 30% of the Republicans total state-wide vote in the House district races. (Land area statistics derived from *Connecticut State Register & Manual*, 1971 and election statistics derived from *Statement of Vote* 1970, published by the State of Connecticut).

This Court's approval of the blatant political structuring characterizing this Plan will encourage, even sanctify, gerrymandering of the nature we have just described throughout the country.

Viewed from the point of view of the individual citizen, whose individual and personal rights the one-man, one-vote doctrine is designed to protect, there is an intuitive resentment at allowing reapportionment authorities to design legislative districts so as to predetermine the outcome of elections. It strikes him as a perversion of the salutary purpose of the reapportionment process under which he is supposed to be given an equally weighted vote.

Concededly, the people are volatile. But the right in the reapportionment authorities to make the attempt at predetermination of elections is disturbing. Up to now, they may have failed because their techniques have been clumsy, and they have not hit upon the correct formula.

However, a tremendous amount of sampling of public opinion goes on all the time. It is done not only by advertisers but also by firms specializing in political predictions. The results of all this polling are classified, quantified, qualified and analyzed through and by computers. They are used to develop group profiles. If, as a consequence of all of this work, a scientifically arrived at standard is discovered which does accurately identify the salient common characteristic of definable groups, then consider the consequences of the use of that standard as the governing principle in reapportionment. The results of elections would then be truly predictable. A mockery would be made of the franchise. Connecticut citizens would go to the polls like the Russians and the Chinese—to evince a civic virtue but not to determine the outcome.

The Equal Protection Clause requires that districts be as equal in population as practicable so that one man's vote has no more numerical weight than another's. This was an important advance.

But it is not enough that a vote be equal. It is more important that the vote matter.

To paraphrase the last lament of Faust: "What doeth it profit a voter to gain the right to equality and lose the right of determination."

In Connecticut, as a result of the Board's political structuring, the voters gain neither and lose both.

Where voters are grouped and classified and made pawns of political parties in order to achieve a purpose unrelated to the essential requirements of the one-man, one-vote doctrine, then they have been invidiously discriminated against. They are thus denied their "individual and personal" right to a real vote under the Equal Protection Clause (*Reynolds* at 562).

The Board's extensive gerrymandering cannot be a justification for the Plan's deviations. It should be a justification for the Plan's invalidation.

IV. The plan, failing to meet constitutional requirements, cannot be raised to constitutional validity by the form of the reapportionment Board which created it.

The Appellant argues that the Connecticut Apportionment Board should be cloaked with such constitutional legitimacy that any document produced by it carries a presumption of rectitude. His focus is on *who* created the Plan of Districting, rather than on *what* they created.

The evidence in this case reveals that partisan political consideration dominated the decision-making of the Reapportionment Board which created the Plan.

Tested by the 1972 election results and using the very measure of political balance asserted by Judge Saden, the Plan was not "fair". Republicans received 54.18% of the

state-wide senate vote and elected 63.88% of the senators; received 52.88% of the state-wide house vote and elected 61.59% of the representatives. Such a disparity raises a serious question of whether the majority of the Board ever intended to be "fair".

However, the issue here is not whether or not one political party gained an advantage over the other. The Appellees in this case are citizens and voters who assert their individual and personal rights under the Equal Protection Clause.

Whatever the composition of the Board, when it failed to meet the required standard of equality among the legislative districts and failed to justify the deviations by a rational state policy, the Plan it created violates the Fourteenth Amendment.

Moreover, the way the Board functioned in this case deprives it of any presumption of fairness. What is abundantly clear from the evidence is that the Plan of Districting that is the subject matter of this action is in reality the handiwork of two men—Judge George Saden and his counsel, James Collins. Judge Saden had served as counsel to the minority leadership in the Connecticut General Assembly from the date it convened on January 6, 1971 (Saden dep. Single App. p. 20). In this capacity, he toiled for some five months, advising the minority members of the General Assembly and the eight-man Reapportionment Commission which attempted to meet the constitutional mandate of reapportionment. In June of 1971, Judge Saden was appointed to the Connecticut Superior Court by the Governor of Connecticut, which appointment was confirmed by the General Assembly on June 3, 1971.[48] He took office on or about

[48] *Journal of the Connecticut House of Representatives*, 1971 Session, June 3, 1971.

June 15, 1971, and within two weeks, he was named to the Reapportionment Board to begin work on deciding on a plan of apportionment for which he had been an actively partisan advocate for five months. In a sense, he found himself in the enviable position of advocating a case for five months as counsel and then being able to decide as a judge the very case he had been arguing.

Judge Saden was substantially aided by Mr. James Collins, who was his chief assistant, mathematician and draftsman (Single App. pp. 29-31). Mr. Collins, like Judge Saden, had served as special counsel to the Republican members of the eight-man Reapportionment Commission and from April 1, 1971 through July 1, 1971, had taken an active partisan role in the reapportionment process. Mr. Collins prepared the drafts of the plans which were submitted by Judge Saden (Single App. p. 31).

The State Constitution required the Board to submit a reapportionment plan by September 30, 1971. The Board first met on August 24 or 25, 1971, hardly a month before the deadline (Single App., pp. 22, 86). Judge Saden and Judge Parskey operated essentially independently of one another in the preparation of a plan and then tried to agree between themselves (Single App., p. 23). Justice Thim was supposed to act as an arbitrator to resolve the difference when the two judges could not agree (Single App., p. 23).

Judge Saden and Judge Parskey agreed as a matter of priority to deal first with the districting of the Senate. They spent the period from August 25 to September 24 primarily on this task (Single App., pp. 23, 25). They met on September 24, now only six days before the deadline. A vote was taken on the Senate plan. After the vote, Judge Parskey left the meeting (Single App., p. 26) and thereafter, there was never another meeting of the Board as a board (Single App., p. 27).

The Board never met over a districting plan for the House. After Judge Parskey left the meeting of September 24, Judge Saden testified "We never got a chance to sit down and go over the House plan from that point on" (Single App., p. 26). The only plan of districting of the House that Justice Thim had presented to him was Judge Saden's, so he had no other choice but to accept that plan (Single App., p. 107).[49]

The Board never met to approve the final district lines for both the House and the Senate as a single plan. The Plan was prepared in its final form, signed by Judge Saden, and then it was taken to Justice Thim at his home for his signature on September 30, 1971 (Single App., p. 27). Judge Parskey declined to approve the Plan but instead filed a dissenting report.

Thus, it is apparent that the document ultimately approved by the majority of the Board was the work of Judge Saden, assisted by Mr. Collins, both of whom for the six months prior to their service on the Board had been actively engaged in the partisan efforts of the Connecticut General Assembly to negotiate a plan of reapportionment. The Appellant would now ask this Court to sanction the highly partisan character of the architects of the plan and to bless their work with some sort of constitutional solemnity simply because the *form* that was followed was cast with statesmanship.

However, the foregoing indicates that one cannot simply look to the form of the Reapportionment Board and come to

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[49] Mr. Collins testified:

"Well, the plan as submitted was accepted by Judge Thim, but if I remember correctly, I think this was the only plan on the House that was submitted to Judge Thim. There was no other plan on the House submitted to him, so the man in fact didn't have any choice, I suppose."

any conclusion that it is entitled to some special favoritism. In actual operation, this Board was neither deliberative nor nonpartisan. Therefore, it is not entitled to any presumption of fairness. Its work product must be scrutinized as carefully as any other plan of apportionment to come before this Court, and the criteria for determining its constitutionality must be the same.

If this Court takes its primary focus off the rights of citizens and voters and begins to ascribe some constitutional sanctity to the claimed "rights" of political parties, as sought herein, then the reapportionment process will itself become the exclusive province of those parties as well. It is inconceivable that this Court would legitimize a political process by giving its work product a presumption of constitutionality at the expense of the explicitly guaranteed rights of citizens and voters as individuals.

V. If this Court allows deviations higher than the lowest practicable to achieve, then the proper interpretation of the Supremacy Clause would permit a state constitutional policy of preserving town lines to justify a higher deviation among the House Districts than provided in the Board Plan.

If this Court construes the Fourteenth Amendment to permit deviations from equality higher than those permitted by the District Court and higher than the lowest that is practicable to achieve, then the state plan is still unconstitutional because, contrary to the Supremacy Clause, it applies an unnecessarily restrictive Fourteenth Amendment standard at the expense of a valid state policy of preserving town lines.

The District Court properly read the leading decisions of this Court (*Reynolds*, *Swann* and *Kirkpatrick*), to mean what they appear to say: namely, that the Equal Protections Clause requires that population of legislative districts must be "as nearly equal as is practicable". The Court found that

the requisite standard of "as equal as practicable" had not been met, and the availability of a plan with a lower deviation irrefutably supports this finding. It further found that the political structuring principle was a substantial cause of the deviation and that this principle was not a proper state policy to justify the deviation.

Appellant claims that the District Court is unnecessarily restrictive and that deviations higher than those mathematically necessary should be allowed.

If this Court is going to reinterpret its prior decisions to permit deviations which are higher than can be practicably achieved, then the Appellees contend the Board plan is still unconstitutional because it violates the Supremacy Clause. In essence, we contend that if the Fourteenth Amendment does not require as small a deviation as is practicable, then a plan prepared under whatever greater latitude this Court might now be prepared to permit, must, within reasonable limits, accommodate state interests such as the integrity of town lines. For example, if this Court were now to permit a range of deviations of up to 15%, the Court would be interpreting the Fourteenth Amendment not to require any smaller deviation. Under the Supremacy Clause, state interests—certainly those set forth in a state's constitution—must not be impaired to any extent greater than required by federal law. Thus, if this Court were now to accord states more latitude, then it must also accord an opportunity for the development of a plan that preserves valid state interests (here, town lines) to as great an extent as federal requirements permit. It would be a coincidence defying belief if the deviation of the Board's Plan was precisely the limit this Court is now prepared to say the Fourteenth Amendment permits. But even if this were so, the evidence shows that the Board Plan cuts more towns than need to be cut even at the same deviation (Single App., p. 178). If any larger deviation is permitted as a matter of federal constitutional law, then any state plan that cuts

town lines more than is necessarily required by the federal standard violates the Supremacy Clause.

Appellees' position is not inconsistent, as the Appellant's brief alleges. Appellees are not saying that the deviations, as mathematical expressions, are simultaneously both too high and too low under the existing standard. Appellees are saying that if the deviations must be as small as practicable, in the absence of a valid state policy justifying same (and political structuring is not a valid state policy), the deviations in the Board Plan are too high. But under any new and less exacting standard of deviation enunciated in this case by this Court and in the presence of a valid state policy (such as the preservation of town lines), the deviations in the Board Plan are too low.

If this Court recognizes respect for town lines as a legitimate reason for higher than mathematically necessary deviations, then the effectuation of this state policy justifies deviations higher than the Board Plan.

Appellees submitted to the Court a plan for the House with a range of deviation of 11.5% (compared with the Plan's 7.8%) which resulted in the division of 31 towns as compared to the Plan's 47 towns and creating 39 segments, as compared to the Plan's 78 segments (Plaintiff's Ex. 21, Single App., p. 179). Appellees also submitted to the Court a plan for the apportionment of the House with a range of deviation of 15% (compared with the Plan's 7.8%) which resulted in the division of 27 towns as compared to the Plan's 47 towns and created 34 segments as compared to the Plan's 78 segments (Plaintiff's Ex. 22, Single App., p. 180). The latter plan represents almost a 50% reduction in the fragmenting of towns at a relatively slight increase in percentage deviation.

This Court has recognized that variations in permissible deviations in order to effectuate particular state policy may depend "on the particular circumstances of the case" (*Reynolds* at p. 578; *Swann* at p. 445). In Connecticut,

towns perform very important state functions (Single App., pp. 135-137, Plaintiff's Exhibit 2; Single App., pp. 195-197). Towns also are the geographic base for political organizations of citizens.

Allowing more flexibility in the interpretation of the Fourteenth Amendment in order to give greater weight to the State Constitutional prohibition against dividing town lines is the proper way to apply the Supremacy Clause of the United States Constitution. Whenever possible, accommodation should be achieved and conflict minimized in the interpretation of the provisions of both the federal and a state constitution. *Reynolds* at p. 584; see also *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926); *Joseph E. Segram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966); *Potlatch Forests, Inc. v. Hays*, 318 F. Supp. 1368 at 1371 (E.D. Ark. W.D. 1970).

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the District Court for the District of Connecticut here appealed from.

If this Court reinterprets its prior decisions to permit deviations which are higher than strict mathematical equality, then this case should be remanded to the District Court with direction to apply the new rules to the facts of this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1476

J. BRIAN GAFFNEY, *Appellant*

v.

THEODORE R. CUMMINGS, ET AL., NANCY ARONIE, ET AL., and THOMAS J. MESKILL, Governor of the State of Connecticut, ET AL., *Appellees*

Appeal from the United States District Court for the District of Connecticut

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REPLY BRIEF FOR APPELLANT

SUMMARY

Certain conceptual and factual aspects of Brief for Appellees justify the filing of this Reply Brief which may be summarized as follows. We start in all constitutional litigation with a presumption of constitutionality, and plaintiffs' initial burden to show an injury before the question of justifications is reached.

In reapportionment insignificant population deviations of the Connecticut type are within the level of presumptive constitutionality contemplated by *Swann* v. *Adams*. The political fairness principle used in Connecticut districting is reached only if plaintiffs show colorable dilution of voting power. When reached, this principle supports the Connecticut plan both by justifying deviations if justification be needed, and by testifying to the overall fairness of the construction of the plan—a plan which in this instance has produced fair results in its first use.

ARGUMENT

I. CONTRARY TO APPELLEES' ASSERTION OF AN "ORIGINAL SIN" QUALITY FOR REAPPORTIONMENT PLANS, SWANN v. ADAMS DIRECTLY CONTEMPLATES LEVELS OF PRESUMPTIVE CONSTITUTIONALITY FOR POST-REYNOLDS REAPPORTIONMENTS

A. "Vote Dilution" and Plaintiff Burden of Proof

An initial restatement of elementals is necessary because on quick perusal of the briefs one might wonder whether opposing counsel were talking of the same case. Appellees' brief misconceives the nature of constitutional litigation, with its basis always in plaintiff demonstration of colorable constitutional injury. It misconceives the meaning of *Swann* v. *Adams*, the most recent relevant case for the constitutional issues raised in the Connecticut litigation.[1] It misconceives the hoary term "gerrymander", so that even an attempt to be politically fair—with resultant actual fairness not even seriously questioned—somehow becomes a gerrymander per se.[2]

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[1] Brief for Appellees, p. 19.

[2] Brief for Appellees, p. 47.

Vote dilution, a term which is part of the lingua franca of reapportionment litigation,[3] simply identifies the perennial problem in all legislative elections of "achieving of fair and effective representation for all citizens." *Reynolds* v. *Sims,* 377 U.S. 533, 565-66 (1964).

Some voters may face an unfair allocation in the number of seats assigned to their area. Vote dilution results because their reach is too short, however tight their grasp. This was vintage vote dilution in the era of *Baker* and *Reynolds.* Other voters of a given persuasion may face political imbalance in the series of equalized population districts in which they dwell. Vote dilution results because however equal their reach they have no grasp. This is vintage vote dilution of the 1970's, else we would have no apportionment plan challengers and no apportionment plan defenders. No one fights over a percentage point or two, although percentage points may be "good" reasons in some forums to reach real political objectives.

Plaintiffs argue that *no* presumption of constitutionality attaches to state reapportionment plans because of the "compelling state interest" rationale which this Court has applied to certain constitutionally protected interests. Brief for Appellees, p. 20-22. This argument is a *non-sequitur.* Compelling justification and its rational basis counterpart are standards of equal protection review which come into play only *after* a differential treatment is shown to result from a challenged classification. Unless plaintiff sustains the

[3] "The right to vote can be affected by a *dilution of voting power* as well as by absolute prohibition on casting a ballot." *Allen* v. *State Board of Elections,* 393 U.S. 544, 569 (1969) (Emphasis added).

initial burden of demonstrating such substantive injury, the presumption of constitutionality upholds the state action in question.

We are not dealing in reapportionment cases with instances of denial of the vote per se.[4] We are dealing with the weight of a vote in a legislative district system, *viz.*, with its effectiveness in political terms, in short, its power. Gross regional voting power dilution was accorded in *Reynolds* a kind of per se quality of unconstitutionality. Such voting power dilution disappears when population deviations are reduced to a low point, and a plaintiff's prima facie case based on numbers alone likewise disappears. This is the message of *Swann* v. *Adams,* 385 U.S. 440 (1967).

Although large population disparities have evaporated, population demographic features can be arranged to maintain voting power dilution. It is a game both sides can play. The most adroit way to achieve plaintiff-oriented "effective representation" is to unhorse a laboriously constructed official state plan by simply proffering another plan marginally tighter in equal population terms. The court immediately invalidates the "unequal" official plan and adopts the plaintiff's self-serving plan, unexamined, as the "constitutional" plan for use in the imminent election.

Experience now points the way for articulation of more refined rules of constitutional litigation in re-

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[4] Where state action totally excludes a class of voters, the prima facie case (substantive injury) under the Fourteenth Amendment is merely the existence of the classification. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School District, 395 U.S. 621 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

apportionment, responsive to both equal protection and forgotten due process values.[5] The Connecticut case can help to point the way toward regularizing the significant judicial concern with voting power dilution.

B. The Presumptive Constitutionality Concept Is Embraced in Swann v. Adams.

Effective management of arithmetic elements of reapportionment litigation requires articulation of rules which with reasonable clarity will: (1) require challengers to articulate a prima facie case in terms of colorable constitutional injury (thus isolating the litigable issue and protecting both state and federal courts from casual intrusions into the political process); (2) illuminate the justificatory burden on the party defending the official plan once challenger has crossed the threshold of articulating such injury; (3) identify the level of conclusive constitutional violation.

In *Swann* v. *Adams,* 385 U.S. 440 (1967) and *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967), this Court took a significant step in this direction. In the course of invalidating a Florida plan in which the most deviant senate and house districts were 15.09 per cent and 18.28 per

[5] If courts hurriedly adopt a belated plaintiff plan (or master's or court-made plan) and a stay is denied, there is a double erosion of due process values. First, the plan to be used is adopted without opportunity for plenary hearing, or perhaps any hearing. Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972). Second, appeal is discouraged or made ineffective even if appellant prevails. Assuming reversal and reinstatement of the original plan after an election has been held, even if the "improperly elected" new legislature does not perpetuate itself by enacting a new plan, a judicially-caused political discontinuity results, the effect of which cannot be undone. Mahan v. Howell, No. 71-364, October Term 1972.

cent from ideal, the Court in an opinion by Mr. Justice White said:

> *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy. 385 U.S. at 444.

The essential doctrinal derivation from *Swann* is three-fold. First, where deviations are as large as in the Florida plan (yielding top to bottom variations approaching 30 to 40 per cent), the plan will not be approved without justification.

Second, de minimis deviations are "unavoidable;" being unavoidable there is logically no need for justification. This formulation established one point of presumptive constitutionality in a sort of "rock-bottom" sense. It misconceives *Swann* to conclude that it establishes the sole level of presumptive constitutionality because the informing purpose of reapportionment litigation is to avoid any meaningful dilution of voting power, and not, as approvingly requoted in *Swann* from *Reynolds,* to require "mathematical exactness." 385 U.S. at 444.

Third, between the above-stated outer boundaries is the yet unresolved point where a duty of justification begins, i.e., where challengers have established a prima facie case on arithmetic grounds alone. A duty of justification may begin at a lower level than with "differences of the [Florida] magnitude," *id.,* but not at some "unavoidable" computer level of deviation. We would then be faced with hundreds of "equally equal"

but politically different plans. Brief for Appellant, p. 48.

Consistent with *Swann* a maximum deviation from ideal district population of five or ten per cent may still be within the range of presumptive constitutionality. This conclusion is supported by a later statement of the author of the *Swann* opinion, Mr. Justice White, in the subsequent congressional districting cases, *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969).[6] Connecticut's percentage deviations are a mere 0.9 per cent for the senate and 3.9 per cent for the assembly districts, in each instance the actual "census persons" deviance being fewer than 800 persons.

Furthermore, the flexibility of the *Swann* approach eases critical census data problems—intrinsic census inaccuracies and incongruity between gross census population and voting population. Census data problems are described in appellants' briefs in all three cases being argued concurrently, i.e., the present Connecticut case and the two Texas cases.[7] The plaintiffs in the

[6] Dissenting, Justice White stated that "as a rule of thumb" he would be satisfied with largest to smallest variations of "10 to 15%, i.e., *deviations* from ideal up to 5 or 7½ per cent. 394 U.S. at 553. The comment is especially significant, coming as it does in a congressional districting case, because it has been suggested since the time of *Reynolds* that there may be even more arithmetic leeway in state legislative apportionment than in congressional districting. It is also noteworthy, as further illuminating *Swann*, that in his *Kirkpatrick/Wells* dissent, Justice White used the term "substantially equal" in characterizing the Court's population ground rule for single member districts. *Id.*

[7] Gaffney v. Cummings, No. 71-1476; Bullock v. Weiser, No. 71-1623; Bullock v. Register, No. 72-147. An especially helpful discussion is contained in Appellant's Brief on the Merits in *Weiser*, pp. 25 *et seq.*

present case, Brief for Appellees, pp. 15-17, criticize the raising of these questions but do not rebut any of the data, nor do they perceive the *Reynolds*-based reason for raising these questions.

Equalization of voting power, not a barren numbers game, is the raison d'etre for constitutionally mandating reapportionment. As the Court stated in *Reynolds*:

> ... the right of sufferage can be denied by a debasement or dilution of the *weight* of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. . . .
>
> The Equal Protection Clause demands no less than substantially equal legislative *representation* for all citizens, of all places as well as of all races. — 377 U.S. at 554, 563, 568. (Emphasis added.)

Gross population malapportionment adversely affects voting power. But when population disparities become miniscule the nexus with voting power becomes seriously attenuated, and when census data is pushed beyond its reliability any possible nexus with voting power ceases. Hence it is highly relevant to consider problems with census data in a case like Connecticut where the average legislative district in the State Plan deviates by fewer than 400 "census persons" from ideal, the maximum deviation is under 800, and the median census unit available to work with was 1,000 persons.

The total inappropriateness of a tight "census persons" equality rule as a guarantee against dilution of voting power is a product of several elements: (1) coding and counting inaccuracy per se; (2) undercount of some groups; (3) area differences in proportion of

voting age population to total population;[8] (4) varied growth rates;[9] and (5) area differences in ineligibles such as aliens or institutional population. Voting day disparities between the real population (or voting population) and the census population, caused by the above factors, can far exceed the few hundred "census persons" deviance in the districts in the State Plan for Connecticut. Placed in functional context, the aspect of vote dilution attributable to population deviations vanishes before the "census population" exact equality level is reached. And the aspect of vote dilution, i.e., partisan political arrangements,[10] which is the sole

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[8] The disparities in voting age population for districts of equal population may be significant. For example, although the seventh and ninth congressional districts in Illinois have virtually identical populations, the seventh contains 275,147 eligible voters while the ninth contains 364,054. *Congressional District Data Book* (Districts of the 93d Congress), U.S. Bureau of the Census (1971).

[9] See Speigelman, *Introduction to Demography* 415 (1968); U.S. Bureau of the Census, *The Materials and Methods of Demography* 806 (1971).

In Connecticut between 1960-70, for example, Hartford's population increased by 20.9 percent while New Haven's and Bridgeport's increases were limited to 10.9 and 15.1 per cent, respectively. *Statistical Abstract of the United States, 1971* 19-20. A 1969 reapportionment of Missouri's congressional districts used for the 1970 elections based upon the 1960 census yielded a plan wherein the most populous contained more than 225,000 more people than the least. *Priesler* v. *Secretary of State*, 341 F.Supp. 1158, 1160 (W.D. Mo. 1972).

[10] R. Pennock and J. Chapman, eds., *Representation* (NOMOS X), 1968. A political scientist recently made this comment: "...only the credulous seriously contend that the requirement of numerical equality between representation districts is capable of precluding the manipulation of the districting process for partisan advantage." Pulsipher, "Positive and Normative Theories of Apportionment," paper delivered at Conference on Democratic Representation and Apportionment, New York Academy of Sciences, November 1-3, 1972.

present concern in reapportionment may be worsened by a rule of exact equality in "census persons."[11]

C. The Presumptive Constitutionality Approach Disposes of Cases Like Connecticut, with Trivial Population Deviations, and Forces Challengers to Produce Actual Evidence Regarding Alleged Dilution of Voting Power

We are pleased to associate ourselves with the parallel arguments in the two Texas cases[12] for a rule of presumptive constitutionality keyed to a low level of population deviation. The proposed formulations vary, reflecting the differences in the cases and the appropriateness of a case by case approach, but the underlying constitutional perception is the same.

In the specific context of the Connecticut case, we suggest the following presumptive constitutionality formula:

> Where the census units used to construct a state legislative reapportionment plan are the most refined available and are not so large as to be inherently unsuitable for creating districts of substantially equal population, a state legislative apportionment in which the population of the most deviant district deviates from ideal by no more than the average population of the census units used, the apportionment plan should be presumed constitutional. The plan should be sustained without more, absent a plaintiff's particularized allegation and proof in terms other than such small pop-

[11] "The political appetite of the chief redistricting technician of the Republican Party in New York was whetted by the 1969 decision to emphasize population equality to the exclusion of all other factors. 'Now it's just a matter of slicing the salami,' the New York Times quoted him as saying, 'and the salami happens to be in our hands'." David I. Wells, "The Impact of Gerrymandering." *The American Federationist*, February, 1972, p. 15.

[12] Supra note 7.

ulation deviations, that the plan is intended or will operate in an invidiously discriminatory manner.

Applied to Connecticut the formula identifies not a de minimis constitutional violation but no constitutional violation at all. The Connecticut average deviation is fewer than 400 "census persons," despite the fact that 88 per cent of the census units used as building blocks exceeded 400 population. The percentage deviation derived from the *census* count deviation is a function of the size of the district being constructed, not a function of the census deviation itself. For the Connecticut senate where the ideal district would be 84,228 the 787 maximum body deviation yields a per cent deviation of 0.9. For the lower house where the ideal would be 20,081, the equivalent 789 body deviation raises the per cent deviation to 3.9 solely because the size of the district is smaller. Brief for Appellant, pp. 30-31. Deviations at such a trivial level defy meaningful linkage to dilution of voting power, bearing in mind also that the actual qualified voters affected will be fewer than the census total population figures, or the margin of census inexactness.

The special question of the relevance of *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller* to state legislative apportionment has been dealt with in our main Brief at pages 34-41. If not wholly inapplicable to state legislative districting, the *Kirkpatrick-Wells* precedents can nevertheless be interpreted as consistent with a presumptive constitutionality rule shaped to the special facts of the Connecticut case. We do have miniscule deviations, and instead of the bad faith of *Kirkpatrick*, 394 U.S. at 531-32, we have the highest kind of good faith—a pursuit of the purpose of political fairness.

Further, it is appropriate to raise a question of plaintiff good faith. This point applies not merely to present plaintiffs but to all recent-vintage reapportionment plaintiffs who seek to win by slipping in belatedly for judicial purview a tight equal population plan of their own.[13] In *Gaffney* the numerical difference between the Board plan and the one plaintiff plan tighter than the Board's plan being so marginal (three of the four plaintiff plans were looser than the Board plan), how could the plaintiffs possibly care which plan was adopted in terms of mere arithmetical calculation of "voting power" divorced from partisan considerations?

The answer of course is that calculations of plaintiff political gain or loss provide the underlying motivations for the great effort of litigation. Once this real issue is perceived, it is all the more vital that plaintiffs produce real evidence of alleged dilution of voting power. The solution is to adopt a reasonable rule of presumptive constitutionality. Thereby parties and courts will be freed from unrealistic arithmetic shadowboxing. Reserved for judicial treatment, on a realistic record, will be only those cases where challengers in traditional constitutional litigation fashion disclose the real reasons for their dissatisfaction with the official plan, and their preference for their own belatedly submitted trivially more "equal" plan. To continue in the present path would be to transfer ultimate control of districting not merely from legislative hands to judicial hands, but to private plaintiff hands.

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[13] Plaintiffs' plans were not submitted to the Apportionment Board at all, and were not available for scrutiny by anyone until submitted as exhibits at the one-day trial in District Court.

II. THE POLITICAL FAIRNESS SPIRIT UNDER WHICH THE CONNECTICUT PLAN WAS DEVISED FULLY JUSTIFIES, IF JUSTIFICATION BE NEEDED, BOTH THE TRIVIAL POPULATION DEVIATIONS WHICH HAVE NO DEMONSTRATED IMPACT ON VOTING POWER, AND THE ULTIMATE FAIRNESS OF THE PLAN

A. This Court Has Recognized That Effective Representation Is An Essential Element of the Right To Vote

Because of the unclear nature of the District Court's handling of the presumptive constitutionality issue, the essence of the case for the court below and plaintiff-appellees may be the "political fairness" issue. The issue nominally appears in two guises, but they are functionally interrelated: (1) assuming arguendo that the political fairness principle had an affirmative relationship to the level of arithmetic deviation actually achieved [14] did the resultant whole constitute a rational plan; (2) assuming no relationship, did the influence of the political fairness principle on the actual placement of district lines independently cause an impermissible impact on voting power, i.e., a gerrymander under the stringent purpose and effect tests of *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971)?

Although conceptually separate, the two points may be discussed together for the purpose of the Reply Brief. Use of a political fairness principle is a benign method to achieve nondilution of voting power. It

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[14] There is no proof in the record, absent plaintiffs' self-serving allegation adopted by the District Court. Testifying at the hearing on the aborted master's Plan James F. Collins, staff expert for the Apportionment Board, stated that in the State Board Plan the factor of political fairness did not affect the deviations; "the deviances are basically and solely related to town line cuts." *Cummings* v. *Meskill*, Transcript of Hearing on Master Plan, June 9, 1972, p. 47.

directly achieves the ultimate goal of effective representation which heretofore we have been seeking *indirectly* by focusing on gross population deviations and voting mechanisms.

The Voting Rights Act of 1965 [15] is highly relevant at this juncture. It has developed from a simple concern with equal *access* of racial minorities to the ballot box to a functional concern with the *political outcome* of the act of voting. With the aid of intervening judicial interpretation, we now have a federal statutory implementation of the political fairness principle for a group which suffered unique dilution of voting power both in initial access and result. Voting Rights Act litigation now goes beyond voting access to a concern that municipal annexations or legislative reapportionment not make politically unfair the nominally equalized opportunity to vote.[16]

In this Connecticut appeal we do not ask this Court to undertake to police all invidious impacts on voting power flowing from legislative reapportionment with the same vigor now authorized for racial minorities

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[15] 42 U.S.C. § 1971 et seq., as amended (1970).

[16] In *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), this Court held that the right to vote recognized under the Voting Rights Act of 1965 must be interpreted in the light of *Reynolds*. This compatibility was understood to include safeguards against the dilution of voting power within the context of effective representation. "The Voting Rights Act was aimed at the subtle, as well as obvious state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make the vote effective.'" *Id.* at 565-66. See also, *Perkins* v. *Matthews*, 400 U.S. 379 (1971).

under the shared roles of the Attorney General and the courts set forth in the Voting Rights Act. We do ask that a state through its official agencies (particularly through such a promising device as bipartisan board with tiebreaker) be permitted to seek in good faith the same kind of political fairness in the outcome of voting that is statutorily mandated for those persons within the coverage formula of the Voting Rights Act. If the state agency errs, there can be judicial correction, but it should be correction only on a developed record responsive to the issue of invidious dilution of voting power.

Elimination of gross population malapportionment blocks only one kind of voting power dilution. Use of the political fairness principle along with tight population equality not only maintains the barricade against such dilution, but erects new barricades against the present danger of voting power dilution in artfully skewed equal population districts. Political knowledge is vital here because we are now dealing with voting power dilution in the ultimate democratic sense of electing or not electing a fair share of representatives to the common forum of decision-making—the legislature.

B. Contrary To Assertions of Plaintiff-Appellees, the State Plan Operated Fairly in Its Initial Use in 1972. The State Plan Not Only Compares Favorably With All Other Plans Proposed for 1972, But Would Have Been a Distinctly Fairer Plan Than Other Plans If Used in Past Elections

Plaintiffs find the use of the Apportionment Board's political fairness principle irrational because of the asserted impossibility in defining "fairness." Brief for Appellees, pp. 35-36. Alternatively they claim that

if "fairness" is definable by election results, then the State Plan operated unfairly in 1972. *Id.* at 36-38. Neither assertion is supportable.

Political fairness is simply the avoidance of dilution of voting power by the manner in which racial or political groups are arranged in districting patterns. It is as reasonably susceptible of ascertainment in general reapportionment as in the Voting Rights Act cases, *supra.*[17] Because "the essence of the democratic system [is] the coincidence between public opinion and the government majority," [18] a politically fair apportionment plan will seek to assure: (1) that a minority of the statewide popular vote will not yield a majority of seats; (2) that the percentage of seats a party or

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[17] The following comparisons of submissions/objections under the Voting Rights Act as of December 31, 1972, were contained in a memorandum prepared by the Civil Rights Division, Department of Justice (emphasis added):

I. Potentially *dilutive* voting law changes

Type	Submissions	Objections
Redistricting (including at-large)	400	56
Annexations	599	4
Majority requirement	24	10
Numbered posts	29	17
Miscellaneous	41	8
Total	1093	95
II. Changes that potentially may deny *access* to the vote	1694	46

These figures show that questions of dilution in terms of *outcome* now constitute a significant proportion of the submissions required under the Voting Rights Act, and objections in the dilution area run at approximately three times the rate (8.7%) as compared with objections regarding access (2.7%).

[18] Duverger, *Political Parties* 391 (2d Eng. rev. ed. 1959).

district voting bloc wins is roughly proportionate to its share of statewide popular vote.

Plaintiffs' assertion that the State Plan operated unfairly in 1972, apparently to cast doubt on the Board's political fairness principle, necessitates careful scrutiny of election data. Brief for Appellees, pp. 36-38. This post-trial attack acknowledges the importance of a political fairness principle. Raising the question of the 1972 election and its relation to past elections boomerangs for plaintiffs. The following can be shown:

1. The excess seat gain for the majority party under the State Plan in the November, 1972 election would have been substantially the same under the four plans favored by the plaintiffs.

2. This "bonus effect" is attributable not to the districting plan but to the empirically derived "law of political scince" that high pluralities in landslide elections yield disproportionate seat gain for the dominant party.[19]

3. The aborted master's plan, prepared "by the numbers" with conscious *lack* of consideration of political fairness turns out to be more unfair than plaintiffs' plans or the State Plan when applied to lower house elections since 1966.

4. Comparison of the State Plan and the four plaintiffs' plans using the data of the 1966, 1968 and 1970 elections likewise demonstrates the greater fairness of the State Plan, most strikingly in re-

[19] *Id.* at 373-75. See also Miller, "One-Party Politics and the Voter," 50 *Am. Pol. Sci. Rev.* 707, 715 (1956); Schattschneider, PARTY GOVERNMENT 74-80 (1942).

gard to 1970. In that year the Democrats won a majority of seats in both houses with a minority of the popular vote.[20] All four of plaintiffs' proposed 1972 plans, and the master's plan, would have produced a minority election in 1970. Only the State Plan would have reflected the will of the people.

First, regarding the 1972 election, for the lower house the Republicans' 53.1 per cent of the popular vote yielded 61.6 per cent of the seats—93 of 151. (See Chart I, Reply Appendix, as support for such computations unless specially noted.) In the senate, the Republicans' 54.18 per cent of the popular vote yielded 63.9 per cent of the seats—23 of 36.[21] At trial plaintiffs submitted four lower house plans, only *one* of which had deviations smaller than in the State Plan. (See Pl. Exs. 20-23, Single App. pp. 178-81, 201-54; and see

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[20] Regarding the minority election of 1970, see Brief for Appellant, p. 70. Plaintiffs cannot properly claim that lack of contest for three of 177 lower house seats in 1970 so "muddied" the results as to preclude significant conclusions. Brief for Appellees, p. 36. Counting the Republican vote in the three uncontested assembly districts as zero yields a slight Democratic majority. However, by adding to the Republican statewide assembly district vote the Republican vote in the senate races for the same areas in 1970, or the normal Republican vote for districts in question in past elections, *Connecticut State Register and Manual 1969, 1971*, the lower house election produces an appropriate 5,000 vote Republican victory. However one computes the 1970 outcome, it is indisputable that the 1970 lower house election was extremely close, yet the Democrats won 21 more seats (99 to 78)! Such figures belie plaintiffs' claim that the results in 1972 were substantially less fair than in 1970.

[21] *Statement of the Vote*, General Election, November 7, 1972, published by the State of Connecticut.

Brief for Appellants, pp. 73-74.) Each of these plans likewise would have yielded 90 or more assembly seats for the Republicans in 1972. Indeed, plaintiffs' single less deviant plan (Pl. Ex. 23) would have come within a single seat of the actual outcome (92 instead of 93).

Second, the bonus effect reflects a "constant tendency" within two party systems to overrepresent the majority party; the degree of overrepresentation increases with the size of the plurality.[22] On the two occasions during the period 1966-1972 when the Connecticut plurality exceeded 50,000 votes, the winning party's representation in the legislature was disproportionate to its percentage of the statewide popular vote. In 1966 and 1968 Democrats obtained lower house majorities of 11.6 and 10.0 per cent greater than that to which they would be entitled by their share of the popular vote. Their pluralities were approximately 80,000 and 50,000 in 1966 and 1968 respectively. Similarly, in 1972 with a popular vote plurality exceeding 87,000, Republicans gained 8.72 per cent more seats than their popular vote percentage—actually a *smaller* excess seat gain than one would have expected under Connecticut's recent experience.

Third, the master's plan, which was constructed with more refined census data than was available for the other plans and had an assembly district maximum deviation from ideal of 1.16 per cent, demonstrates that a blindman's buff approach to reapportionment (eschewing consideration of political data) is not a route to fairness. In the minority election for the lower house in 1970 in which the Democrats had a minority

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[22] See note 19, *supra*.

of the popular vote (49.7 per cent) but won 55.9 per cent of the seats under the old plan, the master's plan would have almost exactly replicated the large error, giving 55.5 per cent of the seats to the Democrats. By contrast the tightest plaintiff plan (Pl. Ex. 23, 1.6 per cent deviation) would reduce the error to 52.3 per cent. The Board plan would have eliminated the error entirely and yielded 77 Republican and 74 Democratic seats.[23]

Particularly incredible in the light of the above demonstration of the fairness of the State Plan is plaintiffs' invitation to compare the State Plan's operation in 1972 *not* with plaintiffs' own plans but with the 1970 results under the old plan. Brief for Appellees, pp. 36-37. Plaintiffs find a smaller percentage disparity between popular vote and seat gain for the senate in 1970 than for the assembly in 1972—3.6 per cent v. 9.0 per cent. But this 3.6 per cent figure in that year was a burglary figure. With a minority

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[23] The shallowness of plaintiffs' complaints about use of a political fairness principle is further supported by additional observations derivable from Chart I. For the 1966-1972 period the State Board Plan would have given the Democrats 302 assembly seats to 299 for the Republicans, a percentage (50.5%) almost identical to the Democrats' total average popular vote plurality of 51.5% (36,398) over the same period. The four plaintiff plans by contrast would have yielded excessive Democratic assembly seat percentages of 54.6, 53.8, 54.0, and 53.6 percent, respectively, with the arithmetically tightest plan having the highest excess seat gain.

Further, the possible theory that observable disparities in 1966 and 1968 between seat gains under the State Plan and plaintiffs' four plans are due to competing gerrymanders is exploded by the 1970 results. The State Plan would have yielded a 77-74 Republican majority, whereas each of the plaintiffs' plans would have yielded Democratic majorities of between 5 and 11 seats in an election where the Republicans polled more votes.

popular vote of 49.15 per cent the Democrats captured 52.77 per cent of the seats! And on the lower house side in 1970 the old plan likewise converted a Democratic popular vote minority (once uncontested districts are taken into account) into a comfortable 21 seat seat margin.[24]

C. The Political Fairness Principle Is the Only State Law Principle in This Post-Reynolds Era Which Can Harmonize Fully and Effectively with the Federal Requirement of Population Equality and Prevent Intentional or Unwitting Gerrymanders

Gaffney v. *Cummings* is not a gerrymandering case. It is a case arising from an attempt to build into the reapportionment process effective safeguards *against* gerrymandering, i.e., invidious districting, both in purpose and result. The mechanism is a bipartisan board with tie breaker. The operating principles are population equality, political fairness, and minimization of town line cuts.

The political fairness principle is the basis for the plaintiffs' wild, unsupported allegations of gerrymandering. Such allegations must be put in context for they rest on a pretended lack of appreciation of the American political system, the role of parties regarding candidacies, issue formation, and legislative decision-making, and the central role of districting in providing the basis through which voting power may be fairly expressed or diluted.

It is a truism that we live under party government so far as legislatures are concerned, albeit "independents" voting for party candidates often determine

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[24] *Supra* note 20.

which candidates win or lose. Despite this obvious fact plaintiffs make the surprising assertion that the statewide total for candidates of a particular party "has no meaning at all"; is not a "rational number." Brief for Appellees, pp. 39-40. Would they still say this if the Republicans with a 51 per cent statewide plurality in an election captured all seats?

Obviously we do not know whether we have achieved politically gerrymandered or politically fair districts until we consult political data. The two questions are simply two sides of one political coin. Hence the factor of "partisan or factional advantage" [25] and the necessity of considering political data has been central both to all accepted definitions of gerrymandering, and to litigations which have probed the question. Law suits have been few both because of doubts about justiciability and because it very soon became apparent that plaintiffs could win "on the cheap," as noted in Part I of this brief, merely by showing the possibility of drawing a still tighter population equality plan, without need to prove gerrymandering. However, in the few cases which have reached the question, e.g., *Sincock* v. *Gately,* 262 F. Supp. 739 (D.Del. 1967) gerrymandering is defined, as above, in terms of explicit political unfairness, and the relevant data is party data. *Id.* at 829.

In sharp contrast to all that has gone before either in gerrymandering definition or litigation, plaintiffs' approach to gerrymandering is extraordinary. They disregard the crucial core element of unfair benefit

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[25] Baker, "Gerrymandering: Privileged Sanctuary or Next Judicial Target?" in Polsby, ed., REAPPORTIONMENT IN THE 1970s 121 (1971).

to one party at the expense of the other.[26] Because they have not and could not make such proof in this case, they offer a novel definition, accepted apparently by the District Court, See Jurisdictional Statement, pp. 10a-11a, in which mere consideration of political factors becomes gerrymandering per se. Their own footnotes refute their text, e.g. Brief for Appellees, p. 47, citing Justice Fortas' *Kirkpatrick* definition of gerrymandering as "arbitrary distortion" for "personal political purposes." 394 U.S. at 538.

What then is the role of a political fairness principle, and a corollary consideration of political data. It is simply one anti-gerrymandering standard, analogous to our former guidelines such as compactness and preserving local subdivision lines. Brief for Appellants, pp. 48-50. The latter were indirect restraints, and are largely inconsistent with a tight federal population equality rule. Political fairness is consistent with any degree of population equality and operates directly against gerrymandering, thus serving as "surrogate plenipotentiary" for the old standards.

In the light of this functional perspective on the realities of voting power dilution, the quiddities in Brief for Appellant, pp. 41-50 concerning shape, town lines, safe districts, and the undefined let alone proven "gigantic gerrymander" conceal rather than reveal the real representation interests at stake. See Brief for Appellant, pp. 70-85. Unless tied to gerrymandering claims, the first three of these points go to state law issues, not federal issues. On the town line issue, and by inference shape and safe districts as well, the Con-

[26] See Brief for Appellant, p. 85 & nn. 73-74.

necticut Supreme Court has recently ruled in favor of the State Plan, finding that it "does not violate state constitutional requirements." *Miller* v. *Schaffer,* No. 7238, 34 *Connecticut Law Journal,* No. 23, pp. 1 at 6, (December 5, 1972) amplifying the bench memorandum reported in No. 17, pp. 1 *et seq.* (October 24, 1972).

Plaintiffs have also argued that consideration of past political data, in an attempt to guard against unfair partisan advantage, is to "predetermine" the outcome of future elections. Brief for Appellees, p. 47. However, the 1972 election results under the State Plan were almost carbon copies of what would have happened under plaintiffs' plans. Chart I, Reply Appendix. The only other evidence plaintiffs offer to support this allegation is that safe seats exist under the Board Plan. This argument fails to reveal an elemental fact of reapportionment. All districting plans in *Gaffney* v. *Cummings* contain a significant and substantially equivalent number of safe seats.[27] The crucial distinction between the state plan and the alternatives is that the state plan under the political fairness principle necessarily was created with knowledge of the likely political impact of the lines drawn. Of course, all district lines have a political impact. To condemn the operation of the Connecticut bipartisan Apportionment Board would be to create a per se rule against good faith political awareness. The consequence of such a holding would be to proscribe the use of perhaps the most effective safeguard against partisan gerrymandering.

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[27] For the four elections between 1966 and 1972, the State plan yields no significantly greater percentage of safe seats (69.5 percent) than the Master's plan (70.8 percent) or the plaintiffs' four plans (70.2, 63.6, 64.9, and 64.9 percent, respectively). Chart II, Reply Brief Appendix.

A court may not wish to order a political fairness process into being and constitutional restraints could well bar such an affirmative order. But if a state chooses to avoid gerrymandering at the outset by applying a political fairness principle to the construction of districts, where can there be any federal inhibition absent plaintiff proof of actual dilution of voting power? It is sometimes hard to improve upon an opponent's Freudian slips. In this instance plaintiff-appellees seem to adopt our total position in the following comment:

> The Equal Protection Clause requires that districts be as equal in population as practicable so that one man's vote has no more numerical weight than another's. This was an important advance.
>
> But it is not enough that a *vote* be *equal*. It is more important that the vote matters.—Brief for Appellees, pp. 49-50, emphasis added.

We could not agree more. The whole focus of the Apportionment Board was on population equalization and concurrent avoidance of dilution of effective voting power.

CONCLUSION

For the foregoing reasons we reaffirm our prayer in our main brief that the judgment of the court below should be reversed and the cause remanded to the District Court with direction to enter an order dismissing the complaint of plaintiffs-appellees.

Respectfully submitted,

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APPENDIX

AFFIDAVIT OF JAMES F. COLLINS, ESQ., STAFF EXPERT, CONNECTICUT STATE APPORTIONMENT BOARD, CONCERNING ELECTION OUTCOMES, 1966-1972, UNDER REDISTRICTING PLANS PRESENTED BEFORE THE FEDERAL DISTRICT COURT IN

Cummings v. *Meskill*
341 F. Supp. 139 (1972)

The undersigned certifies that the attached tabulations (Charts I and II) represent his analysis of what the outcomes of Connecticut elections would have been during the period 1966-1972 if each election had been conducted under the various districting plans which were presented before the court in *Cummings* v. *Meskill*. A certain amount of judgment was involved in making these calculations because the voting units shaped for the district lines in the plans actually used necessarily would not correspond fully with the district lines in other plans which might have been used. However, the number of instances where there is any question concerning the outcome of a particular seat within each computation is small, affecting approximately 15 of the 151 seats, because of the existence of so-called safe voting districts which are endemic to any Connecticut reapportionment plan (see Chart II). The margin of error, therefore, is believed to be no greater than four seats (*i.e.*, plus or minus two) in each of the computations.

/s/ JAMES F. COLLINS
James F. Collins

Feb. 12, 1973
Date

STATE OF CONNECTICUT
COUNTY OF HARTFORD February 12, 1973

Personally appeared JAMES F. COLLINS, signer and sealer of the foregoing Instrument, and acknowledged the same to be his free act and deed before me in Hartford.

/s/ JANET C. LEWIS
Notary Public

My commission expires: 12/30/77.

Chart I

1966 - 1972 CONNECTICUT LOWER HOUSE ELECTIONS

Projected Outcomes Under State Plan and Alternate Plans Presented Before the Court in Cummings v. Meskill and Actual Outcomes Under Plans in Effect

Plan:	PROJECTED OUTCOMES												ACTUAL ELECTION RESULTS							
	State Board Plan (3.93%)		Plaintiffs' Ex. 23 (1.6% Plan)		Plaintiffs' Ex. 22 (7.43% Plan)		Plaintiffs' Ex. 21 (5.97% Plan)		Plaintiffs' Ex. 20 (4.08% Plan)		Master's Plan (1.16%)		Total Seats Won[3]		Percentage Seats Won[3]		Percentage Statewide Vote[3]		Statewide Plurality[3]	
Party: R = Republican D = Democrat	R	D	R	D	R	D	R	D	R	D	R	D	R	D	R	D	R	D		
1966 Seats	59	92	56	95	57	94	55	96	57	94	52	92	60	117	33.9	66.1	45.5	54.5	80,820	D
Per Cent[1]	39.1	60.9	37.1	62.9	37.7	62.3	36.4	63.6	37.7	62.3	36.1	63.9								
1968 Seats	70	81	60	91	57	94	60	91	58	93	58	86	67	110	37.9	62.1	47.9	52.1	47,935	D
Per Cent[1]	46.4	53.6	39.7	60.3	37.7	62.3	39.7	60.3	38.4	61.6	40.3	59.7								
1970 Seats	77	74	72	79	70	81	73	78	72	79	64	80	78	99	44.1	55.9	50.25	49.75	5,288	R
Per Cent[1]	51.0	49.0	47.7	52.3	46.4	53.6	48.3	51.7	47.7	52.3	44.4	55.6								
1972 Seats	93	58	92	59	91	60	91	60	90	61	85	59	93	58	61.6	38.4	52.88	46.86	87,169	R
Per Cent.[2]	61.6	38.4	60.9	39.1	60.3	39.7	60.3	39.7	59.6	40.4	59.0	41.0								

1. The plan devised in 1964-1965 under a judicially-imposed deadline was used in these elections.
2. The new plan prepared in 1971 by the State Apportionment Board was used in 1972.
3. Election result data for the 1966, 1968 and 1970 elections were compiled from the *Connecticut State Register & Manual* for 1967, 1969 and 1971, respectively. Election result data for the 1972 election were taken from *Statement of the Vote,* General Election, November 7, 1972, compiled by the State of Connecticut.
4. Allowance made for unopposed candidates.

Note: The Board Plan and all Plaintiffs' plans contained 151 seats. The Master's plan contained 144 seats. The plan used in the 1966-1970 elections contained 177 seats.

Chart II

1966 - 1972 CONNECTICUT LOWER HOUSE ELECTIONS

Projected "Safe" Assembly Districts Under State Plan and Alternate Plans Presented Before the Court in Cummings v. Meskill

Plan:	State Board Plan (3.93%)	Plaintiffs' Ex. 23 (1.6% Plan)	Plaintiffs' Ex. 22 (7.43% Plan)	Plaintiffs' Ex. 21 (5.97% Plan)	Plaintiffs' Ex. 20 (4.08% Plan)	Master's Plan (1.16%)
Number of Districts in each plan which a single party would carry in all four elections.	Rep. 53 Dem. 52	Rep. 50 Dem. 56	Rep. 45 Dem. 51	Rep. 46 Dem. 52	Rep. 47 Dem. 51	Rep. 49 Dem. 53

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GAFFNEY *v.* CUMMINGS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 71–1476. Argued February 27, 1973—Decided June 18, 1973

Connecticut's legislative apportionment plan was held by the District Court to be unconstitutional because partisan political structuring had resulted in excessive population deviations in the House districting. *Held:*

1. Minor deviations from mathematical equality among state legislative districts do not make out a prima facie case of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment, and in this case, where the House districts deviated on the average by 1.9% and the maximum deviation was 7.83%, a prima facie case was not made out. Pp. 6–16.

2. A "political fairness principle" that achieves a rough approximation of the statewide political strengths of the two major parties does not violate the Equal Protection Clause. Pp. 17–20.

341 F. Supp. 139, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1476

J. Brian Gaffney, Appellant,
v.
Theodore R. Cummings et al.

On Appeal from the United States District Court for the District of Connecticut.

[June 18, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The questions in this case are whether the population variations among the election districts provided by a reapportionment plan for the Connecticut General Assembly, proposed in 1971, made out a prima facie case of invidious discrimination under the Equal Protection Clause and whether an otherwise acceptable reapportionment plan is constitutionally vulnerable where its purpose is to provide districts that would achieve "political fairness" between the political parties.

I

The reapportionment plan for the Connecticut General Assembly became law when published by the Secretary of the State in December 1971. Under the Connecticut Constitution, the state legislature is given the initial opportunity to reapportion itself in the months immediately following the completion of decennial census of the United States. Conn. Const., Art. III, § 6 (b). In the present case, the legislature was unable to agree on a plan by the state constitutional deadline of April 1, 1971. The task was therefore transferred, as required by the constitution, to an eight-member bipartisan commission.

Ibid. The Democratic and Republican Party leaders in the legislature each appointed four commissioners. The commission was given until July 1, 1971, to devise a reapportionment plan, *id.*, § 6 (c); but, although the commission approached agreement, it too was unable to adopt a plan within the deadline. Accordingly, as a final step in the constitutional process, a three-man bipartisan Board was constituted. *Id.*, § 6 (d). The Speaker of the House of Representatives, a Democrat, and the Republican Minority Leader of the House each chose a judge of the State Superior Court to be a Board member, and the two judges in turn designated a third Board member, who was a justice of the State Supreme Court. *Id.*, § 6 (d).

This Apportionment Board, using the census data available during the summer of 1971, and relying heavily on the legislative commission's tentative plans, filed a reapportionment plan on September 30, 1971, with one member dissenting.

According to the 1970 census data before the Board, the population of Connecticut is 3,032,217. The Board's reapportionment plan provides for a Senate consisting of 36 senators elected from single-member districts. The ideal senatorial district, in terms of population, would thus contain 84,228 people. The districts actually created deviate, on the average, by 0.45% from this ideal, the median deviation being 0.47%. The largest and smallest senatorial districts deviate by +0.88% and −0.93%, respectively, making the total maximum deviation 1.81%.[1]

The reapportionment plan proposed a House of 151 single-member districts. The population of the ideal assembly district would be 20,081. The average devia-

[1] The ratio of the largest Senate district to the smallest is 1.018 to 1.

tion from perfect equality for all the plan's assembly districts is 1.9%, the median deviation, 1.8%. The maximum deviation from the ideal is +3.93% and −3.9%. The maximum deviation between any two districts thus totals 7.83%.[2]

In Connecticut, towns rather than counties are the basic unit of local government. See *Butterworth* v. *Dempsey*, 229 F. Supp. 754, 761 (Conn.), aff'd, 378 U. S. 564 (1964). The state constitution provides that "no town shall be divided" for the purpose of creating House districts, except where districts are formed "wholly within the town." Art. III, § 4. No comparable directive exists for the creation of Senate districts. The constitution further provides, however, that the "establishment of districts . . . shall be consistent with federal constitutional standards." *Id.*, § 5. To meet those standards and to reach what it thought to be substantial population equality, the Board cut the boundary lines of 47 of the State's 169 towns.[3] The Board also consciously and overtly adopted and followed a policy of "political fairness," which aimed at a rough scheme of proportional representation of the two major political parties. Senate and House districts were structured so that the composition of both Houses would reflect "as clearly as possible . . . the actual [statewide] plurality of vote on the House or Senate lines in a given election."[4]

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[2] The ratio of the largest assembly district to the smallest is 1.082 to 1.

[3] Some town boundaries were cut more than once, resulting in what the parties have termed "town segments," or portions of a town that were used to form an assembly district not wholly within that town. The Board's plan creates 78 such segments in the formation of the 151 assembly districts.

[4] Testimony of Judge George A. Saden, the Republican Board member. App. 264. According to Mr. James F. Collins, a staff member of the Board, the plan for the House resulted in approxi-

Rather than focus on party membership in the respective districts, the Board took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats.

In November 1971, not long after the Board filed the reapportionment plan with the Secretary of the State, an action was brought in federal district court seeking declaratory and injunctive relief against implementation of the plan. The complaint alleged that the Board "erroneously applied the one man-one vote doctrine of the Fourteenth Amendment . . . to achieve smaller deviations from population equality for the assembly districts than was required by the Fourteenth Amendment . . . and thereby was compelled to segment an excessive number of towns in forming assembly districts." The complaint further alleged the plan amounted to a political gerrymander and contained "a built-in bias in favor of the Republican Party." Appellant Gaffney, the Chairman of the State Republican Party, was permitted to intervene in support of the Board's plan and, after a three-judge court was empaneled, the court heard testimony in March 1972. At the hearing, plaintiffs introduced three alternative House apportionment plans that required fewer town-line cuts, although all three plans involved total deviations from population equality in excess of those contained in the Board plan.[5] A fourth

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mately 70 safe Democratic seats, 55 to 60 safe Republican seats, with the balance characterized as probable or swing Democratic or Republican or "just plain swing," 341 F. Supp. 139, 147. See App. 126–127.

[5] The Board's Senate plan was not challenged in the District Court and no alternative Senate plan was introduced. Appellees do not challenge the Senate districts on the ground of their population deviations. Brief for Appellees 14 n. 4; Tr. of Oral Arg. 20.

plan for the House was submitted with a total maximum deviation from population equality among districts of 2.61%, as compared with the Board plan, which contained a 7.83% total maximum deviation. This alternative plan, however, was prepared without regard for town lines, which were cut substantially more times than in the Board plan.[6] Considerable evidence was introduced demonstrating the obvious political considerations in the Board's district-making.[7] In late March, the District Court filed its decision invalidating the Board plan and permanently enjoining its use in future elections. 341 F. Supp. 139. The court held that "the deviations from equality of populations of the Senate and House districts are not justified by any sufficient state interest and that the plan denies equal protection of the law to voters in the districts of greater population. . . ." *Id.*, at 148. The court relied in part on *Kirkpatrick* v. *Preisler*, 394 U. S. 526. (1969). More particularly, the court found that the policy of "partisan political structuring" "cannot be approved as a legitimate reason for violating the requirement of numerical equality in districting." *Id.*, at 149. The court therefore required that a plan reflecting "closer adherence to the constitutional guidelines" be adopted. Jurisdiction over the case was retained for all purposes, and the court announced that it "will appoint a master . . . to devise a plan conforming to federal and state constitutional requirements. . . ." *Id.*, at 150.

On June 12, 1972, after a motion to expedite consideration of the appeal had been denied (406 U. S. 942),

[6] Plaintiffs' plan reulted in 58 town-line cuts and 88 town segments, as opposed to the corresponding figures of 47 and 78 in the Board's plan.

[7] Plaintiffs further offered testimony illustrating the undesirability—in the context of the State's administrative apparatus—of excessive cutting of town lines.

this Court granted appellant's motion for a stay of the District Court's judgment. 407 U. S. 902. On the basis of that stay, and a subsequent supportive state order,[8] the 1972 fall elections for the State Assembly were held under the Board's reapportionment plan. When this Court convened in October 1972, we noted probable jurisdiction over the appeal. 409 U. S. 839. By this time, a master had been appointed by the District Court and had prepared a reapportionment plan.

II

We think that appellees' showing of numerical deviations from population equality among the Senate and House districts in this case failed to make out a prima facie violation of the Equal Protection Clause of the Fourteenth Amendment, whether those deviations are considered alone or in combination with the additional fact that another plan could be conceived with lower deviations among the State's legislative districts. Put another way, the allegations and proof of population deviations among the districts fail in size and quality to amount to an invidious discrimination under the Fourteenth Amendment which would entitle appellees to relief absent some countervailing showing by the State.

The requirement of Art. I, § 2, of the Constitution, that representatives be chosen "by the people of the several States," mandates that "one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U. S. 1, 8 (1964) (footnote omitted). This standard "permits only the limited population variations which are unavoidable despite a good faith effort to achieve absolute equality, or for which

[8] The order was entered in a parallel state proceeding, *Miller* v. *Schaffer, Sec. of the State*, No. 173606, Super. Ct., Hartford County, filed November 12, 1971, which was directed at correcting certain clerical errors or omissions in the Board's plan.

justification is shown." *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 531 (1969). In *Kirkpatrick* and in *Wells* v. *Rockefeller*, 394 U. S. 542 (1969), the Court found inconsistent with this standard state statutes creating congressional districts having total maximum deviations of 5.97% and 13.1%, respectively. It is the standard of these cases which is the prevailing rule under Art. I and which we confirm in *White* v. *Weiser*, *post*, p. —, today, for the purposes of congressional reapportionment.

Earlier this Term, the question arose whether the same standard is applicable when reviewing state legislative reapportionments under the Equal Protection Clause of the Fourteenth Amendment. *Mahan* v. *Howell*, 410 U. S. 315 (1973). We concluded that there are fundamental differences between congressional districting under Art. I and the *Wesberry* line of cases on the one hand, and, on the other, state legislative reapportionments governed by the Fourteenth Amendment and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its progeny. Noting that the "dichotomy between the two lines of cases has consistently been maintained," 410 U. S., at 322, we concluded that "the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the equal protection test enunciated in *Reynolds* v. *Sims*," (*id.*, at 324), that test being that districts in state reapportionments be "as nearly of equal population as is practicable" and that "[s]o long as the divergencies from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Reynolds*, *supra*, at 579. In *Mahan*, the

ideal district was 46,485 persons per delegate. The maximum variation from the ideal was 16.4%—"the 12th district being overrepresented by 6.8% and the 16th district being underrepresented by 9.6%." 410 U. S., at 319 (footnote omitted). The average percentage variation under the plan was +3.89%. Of the 52 house districts, 35 were within 4% of the ideal district, and nine exceeded a 6% variation from the ideal.

The asserted justification for the divergencies in *Mahan* was "the State's policy of maintaining the integrity of political subdivision lines," 410 U. S., at 315, a policy we found to be rational and wholly sufficient to justify the district population disparities of the size and quality that had been found to exist. We ruled that the "relatively minor variations present in the Virginia plan contrast sharply with the larger variations in state legislative reapportionment plans which have been struck down by previous decisions of this Court," *Mahan, supra*, at 329, and that "Virginia has not sacrificed substantial equality to justifiable deviations." *Ibid.*

Although requiring that the population variations among legislative districts in *Mahan* be justified by substantial state considerations, we did not hold that in state legislative cases any deviations from perfect population equality in the districts, however small, make out prima facie equal protection violations and require that the contested reapportionments be stricken down absent adequate state justication. Nor had we so held in any prior state reapportionment case. *Swann* v. *Adams*, 385 U. S. 444 (1967), and *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967), required state justification of population variations found in state legislative reapportionments, but the variations involved in each of these cases exceeded those we dealt with in *Mahan*.

In the case now before us, appellant urges that the population variations among Senate and House districts

in the Board plan did not in and of themselves demonstrate an equal protection violation and that the State was not required to justify them absent further proof of invidiousness by appellees. For several reasons we think the point is well taken and that the District Court erred in holding to the contrary.

As we noted in *Mahan* v. *Howell*, *Reynolds* v. *Sims* recognized that a State must make an honest and good faith effort to construct its districts "as nearly of equal population as is practicable," but that absolute equality was a "practical impossibility": "mathematical exactness or precision is hardly a workable constitutional requirement." 377 U. S., at 577. Moreover, the *Reynolds*' court also noted that "some distinctions may well be made between congressional and state legislative representation," and that "[s]omewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionments than in congressional districting." *Id.*, at 578. All that would be required was "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 579. In other words, "[s]imply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted compared to the vote of citizens living in other parts of the state." *Id.*, at 568.

As these pronouncements have been worked out in our cases, it has become apparent that the larger variations from substantial equality are too great to be justified by any state interest so far suggested. There were thus the enormous variations stricken down in the early cases beginning with *Reynolds* v. *Sims*,[9] as well as the much

[9] *Reynolds* v. *Sims* involved the Alabama State Legislature, which had not reapportioned itself in over 60 years. Under the apportionment existing in 1964, some senatorial districts with the same

smaller, but nevertheless unacceptable deviations, appearing in later cases such as *Swann* v. *Adams*, 385 U. S. 440 (1967); *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967); and *Whitcomb* v. *Chavis*, 403 U. S. 124, 161–163 (1971). On the other hand, as *Mahan* v. *Howell* demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize, in the context of the eminently reasonable approach of *Reynolds* v. *Sims*, that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.

We doubt that *Reynolds* would mandate any other result if for no other reason than that the basic statistical materials which legislatures and courts usually have to work with are the results of the United States census taken at 10-year intervals and published as soon as possible after the beginning of each decade. These figures may be as accurate as such immense undertakings can be, but

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number of representatives had over 40 times more people than others. House districts with identical representation could vary by 16 to 1. In Maryland in 1964, some House districts with nominally equal repersentation could have six times more people than others, while senatorial districts could be 32 times larger than others. *Maryland Comm'n for Fair Representation* v. *Tawes*, 377 U. S. 656 (1964). The list may easily be expanded to include other States, and Connecticut is no exception. In 1964, the Connecticut towns of Hartford and Union had the same representation in the House, but Union had a population of 383 people, while Hartford had a population of 162,178. A vote in Union was thus weighted about 425 times heavier than a vote in Hartford. At that time, it would have taken only 11.9% of Connecticut's population to elect a majority of its House, and only 31% to elect a Senate majority. See *Butterworth* v. *Dempsey*, 229 F. Supp. 754 (Conn.), aff'd, 378 U. S. 564 (1964).

they are inherently less than absolutely accurate. Those who know about such things recognize this fact,[10] and, unless they are to be wholly ignored, it makes little sense to conclude from relatively minor "census population" variations among legislative districts that any person's vote is being substantially diluted. The "population" of a legislative district is just not that knowable to be used for such refined judgments.

What is more, it must be recognized that total population, even if absolutely accurate as to each district when taken, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phe-

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[10] See, *e. g.*, H. Alterman, Counting People: The Census in History 262 (1969):

"A census, by its nature, can never be an exact count of a nation. This is especially true of the United States . . . . Thus, an error of 1 or 2 percent in the count of the total population is to be expected; professionally, it is regarded as an 'acceptable' error."

The Census Bureau estimates that the 1970 census had an undercoverage rate of 2.5%, or about 5,300,000 people. Address of J. S. Siegel, Population Association of America Annual Meeting, in New Orleans, La., April 26, 1973. See N. Y. Times, Apr. 26, 1973, p. 1, col. 1.

Inexactness of census data is most evident with respect to minorities. It is estimated, for example, that Negroes were underenumerated in the 1970 census by 7.7%, as compared to an estimated 1.9% undercount for white persons. *Ibid.* See also Siegel, "Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications," in Social Statistics and the City 13 (D. Heer, ed. 1968).

nomena.[11] So too, if it is the weight of a person's vote that matters, total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters.[12] The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States. The six congressional districts in Connecticut, for example, vary from one another by as much as 4% in their age-eligible voters, with the first district having 68% of its census population at voting age while the sixth district has 64% at 18

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[11] See, *e. g.*, M. Spiegelman, Introduction to Demography 415–416 (1968); U. S. Bureau of Census, The Materials and Methods of Demography 806 (1971).

In Connecticut, for example, the population of the State as a whole grew by 19.6% during the 1960's. But the population in the area comprising the Second Congressional District grew by over 28%, while the population in the Fourth District grew by only 11.2%. The U. S. Census Bureau, Congressional District Data Book, 93d Congress, Connecticut, p. 7 (1972).

[12] See *Burns* v. *Richardson*, 384 U. S. 73, 91–92 (1966):

"We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured . . . . Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., *e. g.*, *Carrington* v. *Rash*, 380 U. S. 89, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby."

years or older. Bureau of the Census, Congressional District Data Book, 93d Congress, Connecticut, pp. 7–8 (1972). Other States have congressional districts that vary from one another by as much as 29% and as little as 1% with respect to their age-eligible voters.[13] And these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, nonresident military personnel, nonresident students, for example. See *Burns* v. *Richardson*, 384 U. S. 73, 90–97 (1966); *Davis* v. *Mann*, 377 U. S. 678, 691–692 (1964); *Ely* v. *Klahr*, 403 U. S. 108, 115–116 n. 7 (1971); *Mahan* v. *Howell*, *supra*, 410 U. S., at 330–332. Nor do these figures tell anything at all about the proportion of all those otherwise eligible individuals whose vote cannot be counted or weighed because they either failed to register or failed to vote.[14]

Reynolds v. *Sims*, of course, dealt with more than the statistical niceties involved in equalizing individual voting strength. It argued that "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively

[13] Utah, Rhode Island, New Hampshire and Missouri have only 1% variations. New York has a 29% variation in age-eligible voters among its congressional districts, while California has a 25% and Illinois a 20% variation. These figures may be computed from the Bureau of the Census' Congressional District Data, 93d Congress, for the respective States.

[14] Again using Connecticut congressional districts as an example, in the November 1972 elections, the percentage of registered voters who actually voted varied by a maximum of 2.8%. See Statement of Vote, General Election November 7, 1972, Pub. Doc. No. 26, State of Conn. (1973), p. 72. The percentages of registered voters who voted varied by as much as about 23% among the towns in the State. *Id.*, at 65–71.

diluted." 377 U. S., at 562. To conclude differently, "and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result." *Id.*, at 565. More fundamentally, *Reynolds* recognized that "the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment" (*id.*, at 565–566), and it was for that reason that the decision insisted on substantial equality of populations among districts.

This is a vital and worthy goal, but surely its attainment does not in any commonsense way depend upon eliminating the insignificant population variations involved in this case. Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations.[15] There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. See *Mahan* v. *Howell*, *supra*; *Abate* v. *Mundt*, 403 U. S. 182 (1971); *Dusch* v. *Davis*, 387 U. S. 112 (1967); *Sailors* v. *Board of Education*, 387 U. S. 105 (1967); *Burns* v. *Richardson*, *supra*. An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is

[15] For discussions of the vast and growing literature in this area, see Reapportionment in the 1970s (N. Polsby ed. 1971).

recurringly removed from legislative hands and performed by federal courts who themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs, who may have wholly different goals than those embodied in the official plan. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental "choices about the nature of representation," *Burns* v. *Richardson*, *supra*, 384 U. S., at 92, is primarily a political and legislative process. *Reynolds* v. *Sims*, *supra*, 377 U. S., at 586. We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature.

That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.

This very case represents what should not happen in the federal courts. The official state functionaries proposed a plan with a maximum variation among the districts of 7.89% in the House and 1.8% in the Senate, and with respective average variations of 1.9% and .45%. Appellees then proposed four alternate plans for the House, three of which involved slightly larger variations among districts but cut fewer town lines. The fourth cut more lines, but had a maximum variation between its largest and smallest district of only 2.6%. The District Court thought the state plan involved unacceptably large variations between districts, although in the House, with districts of about 20,000 people, the average varia-

tion involved only 399 people, and the largest variations involved only 1,573 people.[16] But neither did the District Court adopt any of the plans submitted by appellees. Instead, it appointed its own master to come up with still another scheme. That plan, we are told, involves a total maximum deviation in the House of only 1.16%.[17] Was the master compelled, as a federal constitutional matter, to come up with a plan with smaller variations than were contained in appellees' plans? And what is to happen to the master's plan if a resourceful mind hits upon a plan better than the master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally "better" when measured against a rigid and unyielding population equality standard.

The point is that such involvements should never begin. We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved. Here, the proof at trial demonstrated that the House districts under the State Apportionment Board's plan varied in population from one another by a *maximum* of only about 8% and that the average deviation from the ideal House district was only about 2%. The Senate districts had even less variations. On such a showing, we are quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out.

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[16] Among the Senate districts (of about 84,000 people each), the average deviation involves only about 400 people and the maximum deviation, only 1,532 people.

[17] Reply Brief for Appellant 19. Apparently, more refined census data was available to the master in preparing this later plan.

III

State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965). See *White* v. *Regester*, *post*, p. ——; *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971); *Abate* v. *Mundt*, 403 U. S. 182, 184 n. 2 (1971); *Burns* v. *Richardson*, 384 U. S. 73, 88–89 (1966). We must, therefore, respond to appellees' claims in this case that even if acceptable populationwise, the Apportionment Board's plan was invidiously discriminatory because a "political fairness principle" was followed in making up the districts in both the House and Senate.

The record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas. Appellant insists that the spirit of "political fairness" underlying this plan is not only permissible, but a desirable consideration in laying out districts that otherwise satisfy the population standard of the reapportionment cases. Appellees, on the other hand, label the plan as nothing less than a

gigantic political gerrymander, invidiously discriminatory under the Fourteenth Amendment.[18]

We are quite unconvinced that the reapportionment plan offered by the three-member Board violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. See *White* v. *Regester*, *post*, p. —; *Burns* v. *Richardson*, *supra*; *Whitcomb* v. *Chavis*, *supra*; *Abate* v. *Mundt*, *supra*. The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral

[18] Appellees also maintain that the shapes of the districts would not have been so "indecent" had the Board not attempted to "wiggle and joggle" boundary lines to ferret out pockets of each party's strength. That may well be true, although any plan that attempts to follow Connecticut's "oddly shaped" town lines (App. 98) is bound to contain some irregularly shaped districts. But compactness or attractiveness have never been held to constitute an independent federal constitutional requirement for state legislative districts. Cf. *White* v. *Weiser*, *post*, p. —; *Wright* v. *Rockefeller*, 376 U. S. 52, 54 (1964), and *id.*, at 59–61 (DOUGLAS, J., dissenting).

phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

It is much more plausible to assume that those who redistrict and reapportion work with both political and census data. Within the limits of the population equality standards of the Equal Protection Clause, they seek, through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its office holders. What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment. As we have indicated, for example, multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized. See *White* v. *Regester, post,* p. —; *Whitcomb* v. *Chavis, supra.* See also *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). Beyond this, we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial in-

terest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. There is no doubt that there may be other reapportionment plans for Connecticut that would have different political consequences and that would also be constitutional. Perhaps any of appellees' plans would have fallen into this category, as would the court's, had it propounded one. But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

Reversed.